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A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

Dennis R. Patrick, Chairman

James H. Quello

Patricia Diaz Dennis

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Federal Communications Commission Record

Volume 3
Issue 25

Table of Contents

Table of Cases..... i

Table of FCC and Delegated Authority Numbers..... iii

Table of Docket Numbers..... iv

Table of Rulemaking Numbers..... v

Table of Localities..... vi

Table by Subject Matter..... vii

Table by Statutory and Rule Provisions..... x

Decisions, Reports, Memorandum Opinions, Orders, and
Other Selected Material.....6921

Federal Communications Commission Record

Table of Cases
Volume 3
Issue 25

Case Name	Page
1988 Orbit Assignment Order	6972
ARCO Communications, Inc.	6952
Aeronautical Radio, Inc.	6994
Air Space Radio Systems	6953
Alascom, Inc.	6978
Amendment of Part 22 - Elimination of Form 430 (ERRATUM)	7023
Amendment of Part 36 - MTS and WATS Market Structure	6997
Amendment of Part 74 - FM Translators	7050
Amendment of Part 95, Subpart E (ERRATUM)	7114
Amendment of Parts 2 and 22 - Cellular Technology and Services	7033
Amendment of Parts 2 and 80 - NEXRAD Weather Radars	7074
Amendment of Parts 73 and 76 - Program Exclusivity Rules	7022
American National Telecommunications, Incorporated	6922
American Satellite Company	6969
American Telephone and Telegraph Company	6980
American Telephone and Telegraph Company	7014
Annual 1988 Acess Tariff Filings	7134
Audio Enterprises, Inc.	7063
BellSouth Corporation	6961
BellSouth Corporation's Cost Allocation Manual	6954
Bott II, Richard P.	7094
Cable TV Rate Regulation - City of Palm Desert, California	7133
Central Telephone Company's Cost Allocation Manual	7126
Cincinnati Bell Telephone Company	7053
Communications Satellite Corporation	7108
Conquest Operator Services Corporation	6921
Contel ASC	6982
GE American Communications, Inc.	6984
GTE Spacenet Corporation	6986
Gray, James Philip	6923
Hughes Communications Galaxy, Inc.	6989
Hughes Communications Galaxy, Inc.	7015
Lynchburg Radio Limited Partnership	6929
Marlin Broadcasting of Central Florida, Inc.	6965
Memorial Hospital	7150
Michigan and Ohio TV Stations	6944
Mobilecomm of Alabama, Inc.	7115
Nacogdoches Telecommunications, Incorporated	7152
National Exchange Satellite, Inc.	6992
Nevada and Pacific Bell's Cost Allocation Manual	7081
New England Telephone and Telegraph Company (ERRATUM)	7013
Orionnet, Inc.	7146

Case Name	Page
Piner, William M.	7101
Plenipotentiary Conference of ITU	7139
Region 40 Public Safety Plan	7132
Regulation of Small Telephone Companies	6940
Rochester Telephone Corporation	7054
Rochester Telephone Corporation's Cost Allocation Manual	7056
Sarasota - Charlotte Broadcasting Corporation	7078
Schumacher, Paul and Nancy	7148
Shriver, Harry R. (ERRATUM)	7145
Table of Allotments, FM, Elko, NV	7066
Table of Allotments, FM, Essex, NY	7070
Table of Allotments, FM, Grinnell, IA	7051
Table of Allotments, FM, Lebanon, OR	7072
Table of Allotments, FM, Lincoln City, OR	7027
Table of Allotments, FM, Manchester, OH	7026
Table of Allotments, FM, Ogdensburg, NY	7029
Table of Allotments, FM, Rapid City, SD	7024
Table of Allotments, FM, Riverside, PA	7028
Table of Allotments, FM, Russellville, KY	7030
Table of Allotments, FM, Shadyside, OH	7068
Tel-Car-Corporation	7031
Telephone Company - Cable Television	7012
Terminating Shared Telecommunications Services	6931
Terrain Shield Low Power TV Translator	7105
Transcaribbean Cable System (ERRATUM)	7137
Webster - Fuller Communications Associates	6967
Western Union Corporation (ERRATUM)	7100
Williamsburg County Broadcasting Corp.	6926

Federal Communications Commission Record

Table of Cases by Delegated Authority and FCC Number
Volume 3
Issue 25

Delegated Authority or FCC Number	Page	Delegated Authority or FCC Number	Page
DA 88 -1763	6923	DA 88 -1885	7133
DA 88 -1764	6926	DA 88 -1889	7114
DA 88 -1765	6929	DA 88 -1891	7145
DA 88 -1781	7031	DA 88 -1892	7115
DA 88 -1819	7078	DA 88 -1896	7126
DA 88 -1832	7012	DA 88 -1899	7134
DA 88 -1833	6921	DA 88 -1900	7137
DA 88 -1834	7014	DA 88 -1901	7146
DA 88 -1835	6922	DA 88 -1910	7148
DA 88 -1836	7015	DA 88 -1911	7150
DA 88 -1837	7013	DA 88 -1912	7152
DA 88 -1838	6952	FCC 88 - 317	7033
DA 88 -1839	6953	FCC 88 - 333	6961
DA 88 -1840	6954	FCC 88 - 342	7105
DA 88 -1851	6994	FCC 88 - 352	6931
DA 88 -1852	7022	FCC 88 - 356	6940
DA 88 -1854	7023	FCC 88 - 358	7108
DA 88 -1856	7066	FCC 88 - 372	6969
DA 88 -1857	7068	FCC 88 - 373	6972
DA 88 -1858	7070	FCC 88 - 374	6978
DA 88 -1859	7072	FCC 88 - 375	6980
DA 88 -1860	7051	FCC 88 - 376	6982
DA 88 -1861	7024	FCC 88 - 377	6984
DA 88 -1862	7026	FCC 88 - 378	6986
DA 88 -1863	7027	FCC 88 - 379	6989
DA 88 -1864	7028	FCC 88 - 380	6992
DA 88 -1865	7029	FCC 88 - 384	6944
DA 88 -1866	7030	FCC 88 - 386	7139
DA 88 -1867	7050	FCC 88 - 388	7074
DA 88 -1875	7081	FCC 88 - 389	7063
DA 88 -1876	7100	FCC 88D - 41	7094
DA 88 -1877	7056	FCC 88D - 42	7101
DA 88 -1882	7132	FCC 88J - 3	6997
DA 88 -1883	7053	FCC 88R - 64	6965
DA 88 -1884	7054	FCC 88R - 65	6967

Table of Cases by Docket Number
Volume 3
Issue 25

Docket Number				Page
CC	Dkt.No.78	-	72	6997
CC	Dkt.No.86	-	467	6940
CC	Dkt.No.87	-	266	7012
CC	Dkt.No.88	-	9	6931
CC	Dkt.No.88	-	161	7023
CC	Dkt.No.88	-	537	7013
GEN	Dkt.No.87	-	24	7022
GEN	Dkt.No.87	-	390	7033
GEN	Dkt.No.88	-	549	7132
GEN	Dkt.No.88	-	550	7074
MM	Dkt.No.85	-	216	6965
MM	Dkt.No.87	-	223	7094
MM	Dkt.No.87	-	526	7101
MM	Dkt.No.88	-	67	7029
MM	Dkt.No.88	-	68	7028
MM	Dkt.No.88	-	70	7027
MM	Dkt.No.88	-	71	7026
MM	Dkt.No.88	-	83	6967
MM	Dkt.No.88	-	140	7050
MM	Dkt.No.88	-	320	7030
MM	Dkt.No.88	-	535	6923
MM	Dkt.No.88	-	536	6926
MM	Dkt.No.88	-	538	7078
MM	Dkt.No.88	-	539	6929
MM	Dkt.No.88	-	540	7024
MM	Dkt.No.88	-	541	7051
MM	Dkt.No.88	-	542	7072
MM	Dkt.No.88	-	543	7070
MM	Dkt.No.88	-	544	7068
MM	Dkt.No.88	-	545	7066

Federal Communications Commission Record

Table of Cases by Rulemaking Number
Volume 3
Issue 25

Rulemaking Number	Page
RM - 5416	7050
RM - 6163	7027
RM - 6165	7026
RM - 6178	7029
RM - 6187	7028
RM - 6314	7030
RM - 6457	7070
RM - 6458	7066
RM - 6462	7072
RM - 6472	7051
RM - 6487	7068
RM - 6546	7024

Federal Communications Commission Record

Table of Cases by City
Volume 3
Issue 25

City/State	Page
Albany, NY	7150
Blackfoot, ID	7094
Cape May, NJ	7148
Elko, NV	7066
Englewood, FL	7078
Essex, NY	7070
Ft. Lauderdale, FL	7031
Grinnell, IA	7051
Harrison, OH	6923
Kingstree, SC	6926
Lebanon, OR	7072
Lincoln City, OR	7027
Lynchburg, VA	6929
Manchester, OH	7026
Newton Square, PA	6952
Ogdensburg, NY	7029
Orlando, FL	6965
Palm Desert, CA	7133
Rapid City, SD	7024
Riverside, PA	7028
Russellville, KY	7030
Shadyside, OH	7068
Troy, NY	7150
Valley Forge, PA	6952
Webster, NY	6967
West Carrollton, OH	7101

Subject Index
Volume 3
Issue 25

Subject	Page
Adjudication	
Exceptions	7094
Orders or Notices	
Programming, specialized	7101
Broadcast Radio Services - General Rules	
Records kept by stations	
Equal employment opportunity program	6944
Broadcasting - AM Stations	
Applications for antennas	
Antenna system, showing required for	7133
Broadcasting - FM Stations	
Allotments and assignments	
Allotments, table of	7024, 7026, 7029, 7030, 7068, 7070,
Broadcasting - TV Stations	
Services	
Affiliations; network program practices; territorial exclusivity	7022
Cable Television Service	
Network nonduplication protection	
Signals, priority of	7022
Carriers: Service Altered	
Cable television video programming facilities	
Video programming facilities by telephone common carriers	7012
Extensions and supplements	
Applications, contents of	6921, 6922,
Commission Organization	
Delegations of authority - Chief, Common Carrier Bureau	
Limitations on delegated authority	7115
Delegations of authority - Chief, Mass Media Bureau	
Commission en banc, matters to be referred to the	7148
Common Carriers: Miscellaneous Rules	
Allocation of costs to regulated or non-regulated costs	6954, 7081,
Enhanced services (computer) and customer-premises equipment	6961

Subject	Page
Communications Act of 1934	
Common Carriers	
Accounts, records, memoranda,forms of; depreciation charges	7053, 7126
Extension of lines, certificate for	6921, 6922,
Radio, provisions relating to	
Applications;form of and conditions attached to licenses	6944
Commission, general powers of	7139
Construction permits	7146
Construction permits or licenses, modification of	7148
Frequency Allocations and Radio Treaty Matters	
Allocation, assignment, and use of radio frequencies	
International and U.S. table of frequency allocations	7033, 7074
Maritime Services	
Frequencies	
Radiodetermination stations, table for	7074
Operational-Fixed Microwave Service, Private	
Technical standards	
Antenna, table of performance standards of directional	6952, 7150
Personal Radio Services: GMRS, R/C, CB	
All services - technical standards	
Channel frequencies for R/C	7114
Practice and Procedure	
Hearing proceedings: hearing and intermediate decision	
Summary decision	6967
Hearing proceedings: presiding officer's rulings	
Interlocutory ruling, appeal from	6967
Information, general	
Time, computation of	7115
Pleadings, briefs	
Extension of time, motions for	7012
Proceedings, miscellaneous	
License or construction permit, Commission modification of	7148
Reconsideration/review of Commission action	
Actions by delegated authority, application for review of	7115
Reconsideration of a final FCC action, petition for	7115
Private Land Mobile Radio Services	
Licensing/use of frequencies in 806-821, 851-866 MHz bands	
Loading requirements for trunked systems	6994
Power (electricity, gas, water)..groups, table of frequencies for	6953
Schedules for placing stations in operations, extension of	6994

Subject	Page
Public Mobile Service	
Applications and licenses-filing requirements	
Forms shared by all domestic public radio services	7023
Applications and licenses-processing	
Station authorization, transfer of control/assignment of	7115
Satellite Communications	
Operation of stations, factors in	
Domestic fixed - satellite service	6969, 6972, 6982, 6984, 6992
Special Broadcast Services	
FM broadcast translator and booster stations	
Definitions	7050
Frequency assignments	7050
Interference considerations	7050
Licensing requirements	7050
Services permissible	7050
Low power TV and TV translator stations	
Frequencies, protection for	7105
Interference considerations	7105
Interference protection for low power and translator stations	7105
Tariffs (Schedules of Rates and Regulations)	
Rules, general	
Letters of transmittal: supporting information to be submitted	6961, 7054
Specific tariff publications	
No references to other tariff publications or other papers	6961
Notice requirements	6961
Telecommunications Companies: Classes A and B	
Nonregulated activities	7053, 7126,
Regulated accounts	7053, 7126,
Transactions with affiliates	7053, 7126,

TABLE OF STATUTORY AND RULE PROVISIONS

	Page
(James Philip Gray)(Harrison, Ohio)	6923
(Lynchburg Radio Limited Partnership)(Lynchburg, Virginia)	6929
(Sarasota-Charlotte Broadcasting Corporation)(Englewood, Flo	7078
(Williamsburg County Broadcasting Corp.)(Kingstree, South Ca	6926
000.047 USC 218 & 403	6940
000.283 Authority Delegated	7148
000.291 of the Commission's Rules	7115
000.309(a) of the Communications Act	7115
000.310(d) of the Communications Act	7115
001.004(b)(2) of the Commission's Rules	7115
001.046 Motions for extension of time	7012
001.087 Modification of License or Construction Permit	7148
001.106 of the Commission's Rules	7115
001.115 of the Commission's Rules	7115
001.251 Summary Decision	6967
001.301 Appeal, Denied	6967
002.106 Table of Frequency Allocations	7074
002.106. Table of Frequency Allocations.	7033
022.011 Miscellaneous forms shared by all domestic public mo	7023
022.039 Transfer of Control and Assignment for station autho	7115
022.930. Special Provisions for Alternative Cell. Tech. & Au	7033
025.391 Qualifications of dom. sat. space station licensees	6969
025.391 Qualifications of dom. sat. space station licensees	6972
025.391 Qualifications of dom. sat. space station licensees	6978
025.391 Qualifications of dom. sat. space station licensees	6980
025.391 Qualifications of dom. sat. space station licensees	6982
025.391 Qualifications of dom. sat. space station licensees	6984
025.391 Qualifications of dom. sat. space station licensees	6986
025.391 Qualifications of dom. sat. space station licensees	6989
025.391 Qualifications of dom. sat. space station licensees	6992
032.014 Regulated Accounts	7053
032.014 Regulated Accounts	7056
032.014 Regulated Accounts	7126
032.023 Nonregulated Accounts	7056
032.023 Nonregulated Accounts	7126
032.023 Nonregulated activities	7053
032.027 Transactions with affiliates	7053
032.027 Transactions With Affiliates	7056
032.027 Transactions With Affiliates	7126
036.601 Universal Service Factor -- General	7134
036.611 Submission of Information to NECA	7134
061.038 Supporting information to be submitted	6961
061.058 Notice requirements	6961
061.074 References to other instruments	6961
063.001 Contents, of Applications	6922
063.001, Contents of Application	6921
063.001, Contents of Application	7014
063.054 Facilities for provision of video programming	7012
064.901 Allocation of Costs	6954
064.901 Allocation of Costs	7053

064.901 Allocation of Costs 7056
064.901 Allocation of Costs 7081
064.901 Allocation of Costs 7126
068.100 Interconnection of Customer Provided Equipment 6931
073.202 FM Table of Allotments 7030
073.202, FM Table of Allotments 7026
073.202, FM Table of Allotments 7027
073.202, FM Table of Allotments 7028
073.202, FM Table of Allotments 7029
073.2080 Equal employment opportunities 6944
073.658 Territorial exclusivity, (Network) - TV 7022
074.1201 Definitions - FM Translators/Boosters 7050
074.1202 Frequency assignment - FM Translators/Boosters 7050
074.1203 Interference - FM Translators/Boosters 7050
074.1231 Permissible service - FM Translators/Boosters 7050
074.1232 Licensing requirements - FM Translators/Boosters 7050
074.703 Interference 7105
074.705 TV Broadcast Station Protection 7105
074.707 Low Power TV and TV Translator Station Protection 7105
076.033 Standards for rate regulation. 7133
076.092 Network non-duplication; extent of protection 7022
076.151 Syndicated program exclusivity; extent of protection 7022
080.375 Radiodetermination Frequencies 7074
090.629 Extended implementaion schedules 6994
090.63 Power Radio Service 6953
090.631 Trunked systems loading requirements 6994
094.075(b) Antenna limitations 7150
094.75 Antenna limitiations 6952
095.623 R/C transmitter channel frequencies 7114
100.154(j) Conduct of Commission business 7108
200.124, Extension of Lines 7015
300.214, Extension of Lines 6921
300.214, Extension of Lines 6922
300.214, Extension of Lines 7014
300.220 Accounts, Records, and Memoranda; Depreciation Charg 7053
300.220 Accounts, Records, Memoranda; Depreciation Charges 7056
300.220 Accounts, Records, Memoranda; Depreciation Charges 7126
300.223 Obscene or Harrassing Telephone Calls 7063
300.303, General Powers of the Commission 7139
300.309 Actions upon applications; Form of and conditions at 6944
300.316 Modification by Commission of Construction Permits 7148
300.319, Construction permit 7146
500.045 diversification of control of mass media 7094
500.065 comparative coverage 7094
500.140 Comparative 7101
CC Docket No. 88-537 7013
NPRM, FM B/C STAS. (Elko, NV), DA 88-1856 7066
NPRM, FM B/C STAS. (Essex, NY), DA 88-1858 7070
NPRM, FM B/C STAS. (Grinnell, IA), DA 88-1860 7051
NPRM, FM B/C STAS. (Lebanon, OR), DA 88-1859 7072
NPRM, FM B/C STAS. (Rapid City, SD), DA 88-1861 7024
NPRM, FM B/C STAS. (Shadyside, OH), DA 88-1857 7068
Rochester Telephone Corporation DA 88-1884 7054

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CONQUEST OPERATOR SERVICES CORPORATION — File No. I-T-C-88-215

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: November 22, 1988; Released: December 5, 1988

By the Chief, International Facilities Division:

1. The above-captioned application, filed on September 22, 1988, by ConQuest Operator Services Corporation (ConQuest), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The application was placed on public notice on October 5, 1988. No comments were received.

2. The applicant is a non-dominant domestic resale common carrier. It now proposes to resell international switched voice services in competition with other common carriers already providing resale of such services. In recent authorizations of new entrants the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by ConQuest.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-88-215 IS GRANTED, and ConQuest is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariff F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2, between the United States and those points listed in those tariffs.

5. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61 (October 1, 1987).

8. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* the cases cited in the Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN NATIONAL TELECOMMUNICATIONS, INCORPORATED — File No. I-T-C-89-002

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: November 22, 1988; Released: December 5, 1988

By the Chief, International Facilities Division:

1. The above-captioned application, filed on October 3, 1988 and supplemented by letter of November 8, 1988 by American National Telecommunications, Inc. (ANT), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The application was placed on public notice on October 19, 1988. No comments were received.

2. The applicant is already providing domestic resale services. It now proposes to resell international switched voice services in competition with other common carriers already providing resale of such services. In recent authorizations of new entrants the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by ANT.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-89-002 IS GRANTED, and ANT is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the United States and those points listed in those tariffs.

5. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of its execution.

6. IT IS FURTHER ORDERED the the applicant shall file tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61 (October 1, 1987).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* the cases cited in the Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] FCC v. RCA Communications, Inc. 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-535

In re Applications of

JAMES PHILIP GRAY (hereafter Gray)	File No. BPH-870330MB
OHIO BROADCAST LIMITED PARTNERSHIP (hereafter OBLP)	File No. BPH-870330MJ
QUEENCITY WEST COMMUNICATIONS, INC. (hereafter Queencity)	File No. BPH-870330ML
THOMAS F. NORNHOLD d/b/a T. N. COMMUNICATIONS (hereafter Nornhold)	File No. BPH-870331KV
DENNY WORKMAN d/b/a HARRISON COMMUNICATIONS (hereafter Harrison)	File No. BPH-870331NL
TOYA JACKSON d/b/a JACKSON COMMUNICATIONS (hereafter Jackson)	File No. BPH-870331OA
VERNON R. BALDWIN & BILLY W. LANHAM d/b/a TRI - STATE COMMUNICATIONS (hereafter Tri-State)	File No. BPH-870331PD
DANNY M. WATSON (hereafter Watson)	File No. BPH-870407KJ
EARNEST L. JAMES d/b/a BROADSTAR COMMUNICATIONS INC. (hereafter Broadstar)	File No. BPH-870408KD

For Construction Permit for a New
FM Station; Channel 282A, 104.3 MHz
Harrison, Ohio

HEARING DESIGNATION ORDER

Adopted: November 8, 1988; Released: December 5, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Gray*. 47 C.F.R. § 73.1125 requires .nat the main studio of an FM station be located within the station's 3.16 mV/m (70 dBU) contour, but that on a showing of good cause may be located outside the community. On June 9, 1987, Gray timely filed a minor engineering amendment to his application to replace the engineering information in his application, as originally filed. However, he failed to respond to Item 12, of Section V-B, main studio location, as to whether the main studio location would comply with the provisions of 47 C.F.R. § 73.1125. Under these circumstances, Gray will be required to file with the presiding Administrative Law Judge, within 30 days of the release of this Order, either an amended response to the above-referenced item and/or, if applicable, a showing of good cause should he propose to locate his main studio outside of his 3.16 mV/m contour, or an appropriate issue will be specified by the Judge.

3. Gray has indicated his intent to terminate his employment with WLW, Cincinnati, Ohio in the event of grant of his application. Accordingly, an appropriate divestiture condition will be specified.

4. *OBLP*. On June 10, 1987, OBLP timely filed a minor amendment to its application indicating that its organizational structure had changed from a general partnership to a limited partnership. As indicated in its amendment, Warren Henderson became a General Partner and the other individuals listed in the application, as originally filed, became general partners in the Limited Partner, Ohio Broadcast Associates. However, OBLP's amendment failed to provide the relevant details of the limited partnership agreement. In *Attribution of Ownership Interest*, 97 FCC 29 997 (1984), *recon. granted in part* 58 RR 2d 604 (1985), the Commission stated that the limited partnership interests were not attributable for the purposes of the multiple ownership rules if the applicant certified that the limited partners will "not be involved in any material respect in the management of" the proposed station. *Attribution*, at 1023. The Commission defined the requisite degree of non-involvement in paragraphs 48-50 of the reconsideration. Further, the Commission directed that Form 301, among others, be amended to conform to the new attribution standards. *Attribution*, at 1024. Accordingly, there is no need for OBLP to provide information as to the limited partners if it can submit the necessary certification and show that limited partnership interests will be sold only to individuals or entities that are sufficiently insulated. If the certifications and showings are not appropriate, the necessary information as to each limited partner will have to be filed as an amendment. Finally, since the Commission retained the cross interest policy as to other attributable media interests in the same area (*Attribution*, at 1030), OBLP will be required to state whether the limited partners have or could have other media interests subject to the cross-interest policy and identify the limited partner(s) with any such interests, identify the other local media, and state the nature or extent of the ownership interest.

5. Section II, Item 4 of FCC Form 301 (October, 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. OBLP has not completed Item 4 correctly. OBLP's application gives a post office box number as the residence for the following Ohio Broadcast Associates general partners: Kenneth W. Bean, Bobby G. and Phyllis L. Parker, and David Rodney Rudisill. Accordingly, OBLP must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

6. *Queencity*. Marty F. Pieratt, a principal of the applicant, has indicated his intent to terminate his employment with WLWT(TV), Cincinnati, Ohio in the event of grant of the Queencity application. Accordingly, an appropriate divestiture condition will be specified.

7. On June 19, 1987, Queencity filed a timely minor legal amendment to its application. Queencity's amendment changes its response to Item 9, Section II of FCC Form 301 from a "no" to a "yes". Item 9 requires that an exhibit be attached if an affirmative answer is made to this question. The exhibit is to include the particulars with respect to documents, instruments, contracts or understandings relating to ownership or future ownership rights. Queencity has failed to provide the requisite exhibit and will, therefore, be required to file an amendment with the presiding Administrative Law Judge within 30 days of the date of this Order containing the required information.

8. *Harrison*. Denny Workman, the sole proprietor of this application was a General Partner of an application[1] for Juneau Alaska. In a *Memorandum Opinion and Order*, released August 11, 1988, in MM Docket No. 87-540, the presiding Administrative Law Judge specified the following character issues with respect to Mr. Workman:

> 1. To determine whether Mr. Workman made false statements or was lacking in candor when he certified his financial qualifications for his applications for Wichita, Kansas (File No. BPCT-870331PZ) and Morton, Washington (File No. BPCT-870331LQ).
>
> 2. To determine whether the applications filed by Mr. Workman on March 31, 1987,[2] were filed for the purpose of building and operating the applied for stations or whether they were filed for the purpose of reaching or carrying out a settlement agreement[s].

In a *Memorandum Opinion and Order*, released August 12, 1988, the presiding Administrative Law Judge dismissed Workman's application and terminated the proceeding because Workman and the other applicant [3] for the Juneau allocation had failed to comply with his Order released July 25, 1988 which directed both of the applicants to pay the 6,000 hearing fee within seven days of the release of that Order. Therefore, since the character issues specified in the Juneau proceeding remain unanswered, they will be specified and tried herein.

9. In response to Section III, Financial Qualifications, of FCC Form 301, Harrison has certified that it *does not* have sufficient net liquid assests on hand or available from committed sources to construct and operate the requested facilities for three months without revenue; and that it *does not* have reasonable assurance that its sources of funds have sufficient net liquid assets to meet their commitments. Accordingly, a financial issue will be specified.

10. *Broadstar*. Earnest L. James, has indicated that he is the president and owner of 100% of the issued and voting stock of Broadstar Communications, Inc. Jaci, Inc., is the licensee of WCIN, Cincinnati, Ohio. All of the voting stock of Jaci, Inc. is owned by Broadstar Communications, Inc. Mr. James has stated his intent to sever all connections with, WCIN(FM), including any employment or consulting position with the station, in the event of grant of his application. Accordingly, an appropriate divestiture condition will be specified.

11. The applicants listed below have petitioned for leave to amend their applications on dates indicated. The accompanying amendments were filed after June 21, 1987, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Gray	April 1, 1988; September 6, 1988; October 17, 1988
Queencity	January 20, 1988
Tri-State	July 11, 1988
Watson	September 1, 1987 (engineering); June 22, 1988

12. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

13. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

14. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. To determine with respect to Harrison, whether Mr. Workman made false statements or was lacking in candor when he certified his financial qualifications for his applications for Wichita, Kansas (File No. BPCT-870331PZ) and Morton, Washington (File No. BPCT-870331LQ).
>
> 2. To determine whether the applications filed by Mr. Workman on March 31, 1987, were filed for the purpose of building and operating the applied

for stations or whether they were filed for the purpose of reaching or carrying out a settlement agreement[s].

3. To determine with respect to Harrison, whether the applicant is financially qualified.

4. To determine which of the proposals would, on a comparative basis, best serve the public interest.

5. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

15. IT IS FURTHER ORDERED, That Gray file an amendment with the presiding Administrative Law Judge, within 30 days of this Order, stating whether he proposes to locate his main studio within his 3.16 mV/m (70 dBu) contour, and if not, a good cause showing should be included.

16. IT IS FURTHER ORDERED, That, in the event of grant of Gray's application, he will be ordered to divest himself of all interests in and sever all connections with Station WLW, Cincinnati, Ohio prior to the commencement of program test authority.

17. IT IS FURTHER ORDERED, That OBLP shall file, within 30 days of the release of this Order, an amendment with the presiding Administrative Law Judge which will provide, for all limited partners, an insulation statement wholly satisfying the multiple ownership and cross-interest policy requirements of the Commission's *Attribution Reconsideration Order*, 58 RR 2d 604 (1985).

18. IT IS FURTHER ORDERED, That OBLP shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

19. IT IS FURTHER ORDERED, That, in the event of grant of Queencity's application, Marty F. Pieratt will be ordered to divest himself of all interests in and sever all connections with Station WLWT(TV), Cincinnati, Ohio prior to the commencement of program test authority.

20. IT IS FURTHER ORDERED, That Queencity file an amendment, within 30 days of the release of this Order, with the presiding Administrative Law Judge with respect to documents, instruments, contracts or understanding relating to ownership or future ownership rights of the applicant.

21. IT IS FURTHER ORDERED, That, in the event of grant of Broadstar's application, Earnest L. Jones will be ordered to divest himself of all interests in and sever all connections with Station WCIN(FM), Cincinnati, Ohio prior to the commencement of program test authority.

22. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Gray, Queencity, Tri-State and Watson ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

23. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

24. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

25. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] Golden Bear Communications General Partnership, (Golden Bear), File No. BPH-840907IA.

[2] These applications are set forth in the presiding Administrative Law Judge's Order, FCC 88M-1376, released May 13, 1988.

[3] Hameed Ahmad, File No. BPH-840319CG.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-536

In re Applications of

WILLIAMSBURG COUNTY BROADCASTING CORP. (hereafter County) — File No. BPH-871008MC

Augusta Radio Fellowship Institute d/b/a SOUTH CAROLINA RADIO FELLOWSHIP (hereafter Fellowship) — File No. BPED-871008MS

For Construction Permit for a
New FM Station in Kingstree, South Carolina
Channel 231A (94.1 MHz)

HEARING DESIGNATION ORDER

Adopted: November 8, 1988; Released: December 5, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *County*. As noted in its June 6, 1988 petition for leave to amend, County's tendered proposal to modify its WKSP(AM) tower on Route 527, 2.1 miles Northwest of Kingstree, was rejected by the Federal Aviation Administration. Consequently, County amended its application, proposing to construct a new tower at a site 3.2 miles Southwest of Kingstree. However, County failed to provide the necessary certification of site availability for its amended proposal pursuant to paragraph 22 of the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (1985).[1] Accordingly, an issue will be specified.

3. Section II, Item 10 of FCC Form 301 requires applicants, in pertinent part, to provide a full disclosure if there are any pending felony charges before a court or administrative body. This disclosure must include details concerning the persons and matters involved, an identification of the court and proceeding (by dates and file numbers), a statement of facts upon which proceeding is based, and a description of the current status or disposition of the matter. County's disclosure states in its entirety:

> There is now pending in Federal Court a felony charge against Gregory A. Knop.[2] The matters at issue are non-broadcast related and do not fall within the Commission's area of concern as expressed in its Policy Statement on Character Issues. Complete details will be provided to the Commission upon request.

4. The Commission's policy in such matters is to refrain from taking any action on non-routine FCC misconduct prior to adjudication by another agency or court. *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1204-5 (1986). However, this policy does not moot the application's informational requirements. Clearly, County's response lacks details identifying the court, the proceeding, the allegations involved and the current status of the case. Accordingly, County will be required to submit an amendment addressing these concerns to the presiding Administrative Law Judge.

5. County is the licensee of AM Station WKSP in Kingstree. It has indicated that it will divest itself of all interest in this station in the event a construction permit is awarded to its FM application as a result of this proceeding. Accordingly, an appropriate condition will be ordered.

6. *Fellowship*. Applicants for FM construction permits are required to have the financial ability to construct and operate the proposed station for three months without relying on advertising or other station revenues to meet operating costs. *Financial Qualifications for Aural Broadcast Applicants*, 69 FCC 2d 407 (1978); *Financial Qualifications Standards*, 72 FCC 2d 784 (1979). Fellowship filed eleven applications between April 22, 1986 and October 8, 1987 for new construction permits to serve communities in Alabama, Georgia and South Carolina. [3] The Kingstree application was filed on October 8, 1987, with the applicant certifying on October 7th that "sufficient liquid assets are on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue."

7. Fellowship's financial qualifications have come under Commission analysis twice in the previous year. On December 4, 1987, a post-designation financial issue was specified against Fellowship to determine if it was financially qualified to construct five of these stations (Byron, Jessup, Vidalia and Leesburg, Georgia; and Florence, South Carolina). *Warner Robins Christian Academy*, (FCC 87M-3159, released December 4, 1987). In response, Fellowship provided documentation that it was relying on a bank loan from The First National Bank of Atlanta "of up to 1,500,000" to meet its predicted expenses of 777,500 for construction and first quarter operations of the five stations. The 722,500 "cushion," Fellowship noted on page 5 of the *Affidavit of Clarence T. Barinowski* (Exhibit 1 to Fellowship's January 21, 1988 "Motion For Partial Summary Decision"), would be utilized "to provide at least three months debit service on the loan funds necessary to build and operate each of these stations." Based on these representations and the lack of opposition to Fellowship's motion, the presiding Administrative Law Judge resolved the financial issue in Fellowship's favor (FCC 88M-454, released February 22, 1988).

8. As part of the "program of random checks of the financial qualifications of applicants for construction permits" announced in the Commission's March 19, 1987

Public Notice (Mimeo No. 2418), Fellowship and all other applicants to serve Murrells Inlet, South Carolina on Channel 233A were required to furnish documentary proof of their respective financial certifications. *Palmetto Broadcasting, Inc. of Murrells Inlet* (Palmetto), 3 FCC Rcd 3928, 3929 (1988). Fellowship indicated that it was relying on the 722,500 "cushion" to meet its anticipated 701,000 construction and operating costs for its six remaining proposals. The staff's analysis indicated, however, that Fellowship failed to factor into this estimate the earlier acknowledged debit service and 30,000 it had agreed to pay Warner Robins Christian Academy for the dismissal of Academy's application. *Palmetto*, at 3930, citing the *Memorandum Opinion and Order* in MM Docket 87-386, FCC 88M-717 (released March 14, 1988). These additional expenses, the staff stated, left Fellowship at least 8,500 short of meeting all its predicted expenses for its six proposed stations. A financial issue will therefore be specified.

9. Further, the staff noted that the First National Bank of Atlanta did not commit itself to loan Fellowship the noted 1,500,000 until December 18, 1987, approximately five months *after* the certification of its Murrells Inlet application. This fact, the Bureau emphasized, raised a serious question concerning Fellowship's candor in its dealings with the Commission, and a misrepresentation issue was specified. Given the fact that Fellowship also certified on October 7, 1987, two months prior to the First National Bank of Atlanta's commitment, that it was financially qualified to construct and operate the Kingstree facility, an appropriate misrepresentation issue will be specified in this proceeding.

10. *Other Matters*. County petitioned for leave to amend its application on February 24 and June 6, 1988 (Engineering); Fellowship petitioned for leave to amend its application on June 28 and September 9, 1988. The accompanying amendments were filed after December 28, 1987, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

11. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

12. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether County has reasonable assurance that the transmitter site specified will be available to it.

2. To determine with respect to Fellowship whether, in light of the evidence adduced concerning the deficiencies set forth above in this Order, the applicant is financially qualified.

3. To determine (a) whether, in light of the evidence adduced pursuant to issue 2, above, Fellowship made misrepresentations to the Commission, was lacking in candor in its dealings with the Commission or attempted to deceive or mislead the Commission and (b) if issue (a), above, is resolved in the affirmative, the effect thereof on Fellowship's basic qualifications to be a Commission licensee.

4. To determine which of the proposals would, on a comparative basis, best serve the public interest.

5. To determine, in the light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

13. IT IS FURTHER ORDERED, That County shall file an amendment to its response to Section II, Item 10 of FCC Form 301 with the presiding Administrative Law Judge within 30 days of the release of this Order.

14. IT IS FURTHER ORDERED, That in the event of a grant of County's application, the applicant shall divest itself of all interest in radio station WKSP(AM) prior to the commencement of program test authority.

15. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by County and Fellowship ARE GRANTED and the corresponding amendments ARE ACCEPTED.

16. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

17. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

18. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] This deficiency is not fatal since County's tendered proposal satisfied the *Report and Order*'s requirement concerning the certification of site availability.

[2] By amendment filed February 24, 1988, County indicated that Mr. Knop resigned his positions as President and Director but retained 100% voting interest in the applicant. As a result, his wife is the sole officer and sole director, but holds no voting or non-voting stock.

[3] Three of these applications (Jessup, Byron and Vidalia, Georgia) have been granted. Two applications (Huntsville, Alabama and Florence, South Carolina) have been returned, but Fellowship has filed petitions for reconsideration of these actions. Two applications (Murrells Inlet, South Carolina and Leesburg, Georgia) have been designated for hearing. Three applications (Ocilla and Rome, Georgia and Loris, South Carolina) remain pending with the Commission's staff. As Fellowship noted in its September 9, 1988 amendment, it filed applications in 1988 to serve St. Matthews and Walterboro, South Carolina (File Nos. BPED-880301MD and BPED-880602MM, respectively), Wilmington, North Carolina (File No. BPED-880602ML) and Millen, Georgia (File No. BPED-880616MN).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-539

In re Applications of

LYNCHBURG RADIO LIMITED PARTNERSHIP (hereafter Partnership)	File No. BPH-870918MB
ROANOKE VALLEY CELLULAR TELEPHONE COMPANY (hereafter Telephone)	File No. BPH-870918MK
LYNCHBURG RADIO BROADCASTING (hereafter LRB)	File No. BPH-870918MO
CENTRAL VIRGINIA BROADCASTERS (hereafter Central)	File No. BPH-870918MU
FRIENDSHIP BROADCASTING CORPORATION (hereafter Friendship)	File No. BPH-870918NL

For Construction Permit for a New
FM Station on Channel 290A (105.9 MHz)
in Lynchburg, Virginia

HEARING DESIGNATION ORDER

Adopted: November 8, 1988; Released: December 5, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Telephone.* In its June 6, 1988 amendment to its pending application (File No. BPH-871110NQ) to serve Sacramento, California on Channel 278A, Sacramento FM Broadcasters Limited Partnership (FMBLP) indicated that Billy J. Parrott, the 100% owner of Telephone, has an interest in and connection with Cajun Broadcasting Co., apparently an applicant for new commercial television facilities at New Orleans, Louisiana. Further, FMBLP's amendment noted that Mr. Parrott's wife, Geraldine Parrott, is a 33 1/3% principal in an application filed May 18, 1988 by Female Frequency to serve Tice, Florida. Neither of these interests are disclosed in the instant application. Telephone will, therefore, be required to submit all information required by Section II of the application concerning the above interests to the presiding Administrative Law Judge.

3. *Central.* In response to Section I, Item 9(a), Central indicates that it is in violation of the provisions of Section 310 of the Communications Act of 1934, as amended, relating to interests of aliens and foreign governments. Accordingly, an issue will be specified.

4. Section II, item 4(a), FCC Form 301 (October 1986) requires an applicant to specify its address (number, street, city, state) as well as the home address of each of its principals. Central has not completed item 4(a) correctly. The Central application gives no street address for its principals. Accordingly, Central must submit an amendment which gives all the information required by Section II, item 4(a), FCC Form 301, to the presiding Administrative Law Judge within 30 days after this Order is released.

5. In response to Section III, Central indicates that it is not financially qualified to construct and operate the requested facilities for three months without revenue. Furthermore, Central states that it will amend its application when its financing plans are complete. To date no such amendment has been filed. Accordingly, an issue will be specified.

6. *Other matters.* Partnership and Central propose to mount their antennas on the existing WBRG (AM) tower. Telephone and LRB propose to mount their antennas on the existing WLVA(AM) tower. Our engineering study indicates that the combined operation of the respective existing AM stations and each of the proposals may significantly exceed the ANSI guidelines for human exposure to radio frequency (RF) radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned that the applicants may have failed to comply with the newly revised environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). Under the newly revised rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in the newly added 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in the newly revised 47 C.F.R. § 1.1311. Since the four applicants' proposals may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, each will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. The cumulative effect of the proposed operations and all nearby RF sources must be considered. Therefore, Partnership, Telephone, LRB and Central will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of this case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

7. Partnership and Friendship have indicated in response to Section V-B, Item 11 of FCC Form 301 that their respective facilities would not satisfy the city coverage requirements of 47 C.F.R. § 73.315(a). Engineering review of these applications reveals that Partnership's proposed facilities would reach 90% and Friendship's proposed facilities would reach 97% of the area of Lynchburg. Accordingly, both have submitted facts and circumstances which persuade us that a waiver of Section 73.315(a) is not required since there is substantial compliance with the rule. *Letter to Southwest Communications, Inc. (KLDN - FM),* released July 16, 1986, citing *John R. Hughes et. al.*, 50 Fed. Reg. 5679 (1985).

8. Amy K. Smith-Modrick, the general partner of Partnership, is an employee of WSET-TV, Lynchburg, Virginia, and Robert Goins, a 50% stockholder of Friendship, is an employee of WJJS Lynchburg, Virginia. Both have indicated their intent to terminate their relationship with their respective stations in the event of grant of their referenced application. Accordingly, in the event of grant of Partnership's application, Amy K. Smith-Modrick will be required to sever all connections with WSET-TV prior to the commencement of program test authority, and in the event of grant of Friendship's application, Robert Goins will be required to sever all connections with WJJS prior to the commencement of program test authority.

9. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

10. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Partnership, Telephone, LRB and Central, in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposals are consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine whether Central is owned or controlled by aliens or their representatives in violation of Section 310(b) of the Communications Act of 1934, as amended.

3. To determine with respect to Central, whether the applicant is financially qualified.

4. To determine which of the proposals would, on a comparative basis, best serve the public interest.

5. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

11. IT IS FURTHER ORDERED, That Telephone shall submit an amendment containing the information specified in paragraph 2 hereinabove, to the presiding Administrative Law Judge within 30 days of the release of this Order.

12. IT IS FURTHER ORDERED, That Central shall submit an amendment which contains the information required by Section II, item 4(a), FCC Form 301, to the presiding Administrative Law Judge within 30 days after this Order is released.

13. IT IS FURTHER ORDERED, That, within 30 days of the release of this Order, Partnership,Telephone, LRB and Central shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge, with a copy to the Chief, Audio Services Division.

14. IT IS FURTHER ORDERED, That, in the event of grant of Partnership's or Friendship's application, either Amy K. Smith-Modrick or Robert Goins will be ordered to divest herself/ himself of all interests in and sever all connections with Station WSET-TV or WJJS, respectively, prior to the commencement of program test authority.

15. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

16. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

17. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-9

In the Matter of

Policies Governing the Provision
of Shared Telecommunications
Service

REPORT and ORDER

Adopted: October 31, 1988; Released: December 6, 1988

By the Commission:

I. INTRODUCTION

1. On January 27, 1986 we adopted a Notice of Inquiry[1] in this docket to examine regulatory issues involved in the development of Shared Telecommunications Service (STS) systems and the associated effects on the potential resale of local services, local exchange rates, and state regulation of STS implementation. In the *NOI*, we concluded that our existing policies did not address the majority of the important questions raised by state restrictions on STS systems, and we presented a wide range of issues to be decided before reaching any final conclusion on an appropriate federal role.

2. The record in this proceeding indicates that states, local exchange companies, and STS providers are in the process of establishing a framework for the development of STS systems that is consistent with the particular circumstances in each state. Although we remain concerned that state regulations should not unnecessarily hamper STS systems and should not intefere with interstate telecommunications service, we do not preempt state regulation at this time. We note that several states have made progress in creating regulations that do not impede STS development. Moreover, the STS Model State Policy adopted by the Committee on Communication of the National Association of Regulatory Utility Commissioners (NARUC) in 1987 recommends eliminating partitioning,[2] which the record indicates is the greatest impediment to STS development. Accordingly, we terminate this proceeding. We will, however, continue to observe the progress of STS development. Should any problems arise that impede federal interests, we will revisit this issue in the future. Moreover, the Commission complaint process, described in Section 208 of the Communications Act, is available to resolve any specific problems that may arise regarding STS regulation by a state that impinges on a federal interest.

II. BACKGROUND

A. *STS System Description*

3. In an STS system, the occupants of a multitenant building or building complex use voice and data equipment located on their premises to connect with a shared private branch exchange (PBX) or other customer premises equipment (CPE) (the STS switch) typically provided by the building owner, a user association, or an outside contractor. STS systems use communication and computer technologies to provide their users with local and interexchange basic service, and, in some cases, enhanced services. As we noted in the *NOI*, the STS switch permits users to call each other directly without using local exchange carrier (LEC) facilities and to call anywhere on the switched network through trunks that connect the STS switch with a subtending LEC central office. In addition, by aggregating their customers' demand for interexchange services, STS operators can purchase such services at bulk discounts and resell them to those customers at more favorable rates. Furthermore, the STS operator can use the least cost routing features included in most STS switches to resell interexchange services purchased from variety of carriers. [3]

4. There are two types of STS systems -- those that use "partitioned" switches and those that use "unpartitioned" switches. In a partitioned switch, which does not involve the resale of local service, although lines from the central office are connected with the switch, software and special hardware treat these lines as if they directly connected to each tenant. A partitioned switch does not allow aggregation of user demand for local service, thus requiring the same number of access lines as if each user of the STS system was separately connected to the network. Moreover, each user of the partitioned switch receives a bill from the LEC. In contrast, an unpartitioned switch is connected to the LEC's central office using the minimum number of shared lines, determined through traffic engineering, required to meet overall system needs. By aggregating the requirements of all the users of the unpartitioned STS system, the lines to the central office can be more efficiently employed. Unpartitioned switches are often used by their operators to offer a form of local service resale to users because of the savings possible from their efficient engineering.

B. *Prior Proceedings*

5. On May 16, 1985, International Business Machines (IBM) filed a request for declaratory ruling[4] asking this Commission to declare that state laws and regulations precluding the competitive provision of STS systems are inconsistent with, and have been preempted by, existing Commission decisions and policies. IBM argued that such a declaration was necessary in light of an array of inconsistent state regulations that were restricting the use of such systems and jeopardizing the achievement of efficiencies in the interstate network that STS systems could provide. According to IBM, many of the state-imposed restrictions on STS systems were designed to prevent such systems from becoming alternative (or competing) suppliers of LEC-provided local telephone service, and interstate access service.

6. In January 1986, we adopted the *STS Order*,[5] partially granting the IBM Petition by reaffirming the right of users to interconnect the CPE used to provide STS with the public switched network. In the *STS Order*, we

concluded that our existing interconnection policies require LECs to interconnect partitioned STS switches that are either shared among multiple entities or used by third-party operators to provide PBX services to multiple users. However, we held that this interconnection right does not give CPE users or STS providers the right to resell local service, in violation of state restrictions, through an interconnected unpartitioned STS switch. We also found that our existing interconnection policies do not support a declaration that this Commission has preempted state regulations that prevent the resale of local exchange service by an STS operator. We found that preemption of such state restrictions would be a new policy to be considered in a further proceeding.

7. On the same day that we adopted the *STS Order*, we adopted the *NOI* in this proceeding to examine regulatory issues involved in the development of STS systems. The *NOI* observed that the introduction of STS systems has attracted substantial regulatory attention at the state level, since some state regulatory commissions have reacted favorably to the introduction of STS systems, while others have developed, or are developing, regulations that prevent the resale of local service through an STS system. We tentatively concluded that the existing regulatory treatment of STS systems may well prevent multiple STS customers from using a shared switch (essentially a PBX) as efficiently as single customers can use unshared PBXs, and expressed concern with the possibility of unfair discrimination against smaller users, who in some cases may only be able to obtain access to the features of sophisticated CPE through an STS system. We found that existing state regulation may confer an unwarranted competitive benefit on larger firms, which can afford their own unshared PBXs and aggregate their traffic to reduce their requirements for local exchange lines without restrictions.

8. The *NOI* also observed that the introduction of STS systems seems to benefit the public by increasing the availability of state-of-the-art telecommunications technology and by providing opportunities for small users to take greater advantage of competition in interstate service. However, we stated that we needed more information to determine whether state regulations that treat multi-user STS systems differently from single-user PBXs can be justified on economic, technical, or other regulatory grounds. We also noted that we did not possess enough information to assess the cost savings that STS systems would provide to customers and society as a whole, especially savings from the resale of local service. Therefore, we invited comments on topics such as the effect of state regulation on STS systems, the potential benefits of widespread use of STS systems, and the potential adverse effect of the widespread introduction of STS systems. Over 70 parties filed comments and reply comments in response to the *NOI*.[6]

III. POSITIONS OF THE PARTIES

A. *The Benefits and Costs of Unpartitioned STS* [7]

1. *Benefits*

9. Proponents of preemption of state STS restrictions argue that the provision of STS through unpartitioned systems benefits STS users, providers, LECs and society at large and promotes the federal interest in increasing the efficiency and availability of telecommunication-related services through competition.[8]

10. Such parties argue that the unrestricted provision of unpartitioned STS will save societal resources and reduce costs to end users while providing additional services and benefits to consumers.[9] For example, RCA Network argues that federal preemption of local trunking resale restrictions is necessary for the provision of unpartitioned STS and thus clearly in the public interest, since "[s]uch action will promote customer choice, competition, cost-based rates . . . [and] will permit small and medium sized tenants of commercial developments to receive the same communications services . . . that are presently available to large companies which use private PBXs."[10]

11. These commenters emphasize that the unpartitioned switch provides local and interstate service more efficiently and at a lower cost through the concentration of fewer central office trunks.[11] Ad Hoc indicates further that the benefits of sharing are greatest for smaller users since "the benefit of aggregation declines as the individual trunk group grows larger."[12]

12. Conversely, according to Ad Hoc, the potential inefficiencies in not using an unpartitioned STS system are particularly pronounced for users with less than five lines. Without an unpartitioned STS sharing arrangement, a small user would probably have to purchase as many access lines in a partitioned STS system as it would require in a non-STS system.[13] Ad Hoc states that since trunks cost more than access lines, a small user's costs would be from 50 to 150 percent greater in a partitioned STS environment than in an unpartitioned system. Ad Hoc claims that it could well be cheaper for a small user to use a separate key system interconnected with the LEC than a partitioned STS system.

13. Ad Hoc states that although a partitioned STS system permits the provision of interstate service, it increases the cost relative to an unpartitioned switch. Since local access trunks carry interstate traffic, the added trunks required in a partitioned system increase the cost of interstate service. Moreover, IBM states that a partitioned switch also requires more trunks than needed for an unpartitioned switch to handle outgoing interstate calls that overflow from Wide Area Telephone Service (WATS) lines.[14]

14. According to IBM, in a partitioned STS switch, the line and trunk port arrangements must be reconfigured when a participating STS user expands or reduces usage.[15] Parties argue that, compared to an unpartitioned switch, a partitioned switch requires additional hardware and software as well as additional processing steps that slow down processing. Thus, these parties claim, partitioning "severely impacts the ability to provide efficient inexpensive interexchange services."[16]

15. Other parties emphasize the benefits of unpartitioned STS systems generally. For example, Fairchild claims that features available to STS users at little or no extra cost include low-cost long distance access, call forwarding, call waiting, queuing, conferencing and data transmission. According to Fairchild, unpartitioned STS systems sometimes provide enhanced features such as "central message center" and "central word processing" that cannot be obtained through Centrex. Fairchild states further that such STS users also have less down-time than users of Centrex, PBXs, or single key systems, because STS systems often include the services of on-site technicians.[17]

Honeywell claims generally that data or word processing or simultaneous voice and digital applications cannot be obtained through Centrex.[18] Mass Communications contends generally that STS systems provide advanced telecommunications service and features to rural areas, where such features are not otherwise available.[19] Moreover, in contrast to those LECs and states that argue that STS will threaten universal service, US West argues that STS will promote universal service.[20] Several other parties claim that STS will stimulate network usage and revenues because STS has added technical features that increase the successful completion of calls, increase off-peak use, and include remote voice storage.[21]

16. While the LECs generally view STS providers as potential competitors[22] and argue that there is little, if any, benefit from STS *per se*, some LECs and states indicate that STS could potentially benefit small users by enabling them to obtain PBX features that otherwise may not be available.[23] BellSouth states that an unpartitioned STS system "offer[s] equipment and service features to users which might otherwise be economically prohibitive and makes affordable, through economies of scale, features not generally associated with small PBXs or key systems."[24] Southwestern Bell Telecom, a subsidiary of Southwestern, apparently has argued to Texas that since STS operators will be able to operate more efficiently, there will be less incentive for them to use other bypass facilities.[25] Some LECs contend that Centrex and key systems can satisfy the demand for features available in STS systems,[26] although other parties state that all the features available through STS are not available through Centrex and key systems.[27]

17. According to Bell Atlantic, in states where unpartitioned STS providers can offer direct inward dialing (DID), the STS switch can serve dozens or hundreds of end users using a far fewer number of lines than Centrex or key systems.[28] While some LECs suggest STS end users might not realize savings from the use of STS systems,[29] other parties state that the competition stimulated by unrestricted provision of STS will create incentives for STS providers to pass on cost savings.[30]

2. *Costs*

18. Most LECs emphasize that the unrestricted provision of unpartitioned STS systems will produce losses in LEC revenues and a consequent erosion of universal service.[31] Some LECs also claim that unfettered STS development would lead to an increased likelihood of stranded LEC investment and increased difficulty in network planning. Southwestern acknowledges that users of unpartitioned STS systems should save money because they will use fewer trunks. However, it also argues that, in general, LECs will continue to be the providers of last resort, which requires them to maintain investment for the trunks needed if they have to serve all customers. According to Southwestern, the potential for reducing the number of direct customers of the LECs because of widespread use of STS will not reduce the LECs billing or collection costs.

19. Several commenters express concern that unpartitioned STS will lead to deaveraged rates because STS providers will "cream-skim" local exchange service by capturing businesses that provide the greatest contribution to network costs, leaving residential customers to pay significantly higher bills. For example, DC Peoples Counsel states that Centrex access lines account for 40% of the access lines in the District of Columbia. With the introduction of unpartitioned STS, DC Peoples Counsel predicts substantial revenue losses for the LECs.[32] Pacific and Ameritech contend, however, that STS will not by itself lead to rate deaveraging.[33]

20. According to Ameritech, business customers, the customers most likely to use STS systems, traditionally have subsidized residential customers. For example, Ameritech states that Indiana Bell Business Exchange Service provides a subsidy of 3.20 per month to each residence line.[34] According to BellSouth, business customers in Tennessee and Georgia contribute 4.89 and 3.63 per month, respectively, for each residential line.[35]

21. While opponents of unpartitioned STS emphasize the societal costs of using such systems, most parties acknowledge that partitioning adds some costs to STS systems, although estimates of these costs vary widely.[36] STS providers claim that such costs can be substantial, adding 10-25 percent to the cost of the switch.[37] In a study of STS partitioning, IBM concludes that partitioning adds 25 percent to the cost of providing STS.[38] IBM states that even if total partitioning costs added only 6 to 7 percent, such a "cost increase can dissipate the economic attractiveness of a competitive business venture."[39] It contends that over a seven year period additional costs of partitioning may be as high as 1,000,000.[40] NATA provides estimates that added costs of partitioning can increase switching costs 20-25 percent.[41] Honeywell estimates that partitioning results in a reduction of the effectiveness of the switch by approximately 50 percent. Thus, Honeywell indicates that "a requirement of partitioning could result in as much as a 100 percent increase in the price of services to consumers."[42] Ad Hoc provides a number of examples of the costs caused by partitioning a non-partitioned STS system. According to its estimates, cost increases associated with partitioning vary from 100-300 per station, while the number of trunks increase between 139 percent and 1038 percent.[43] However, Intelligent Systems Engineering estimates that although partitioning increases the cost of the switch by 15-20 percent, this should not make a project uneconomical unless it is a very small project.[44]

22. Estimates of monetary cost for partitioning developed by some LECs are lower.[45] Pacific states that partitioning-related costs stem from the increased memory and programming time needed to establish each customer's partitioned segment of the switch. Moreover, it notes that some switches cannot be partitioned.[46] US West estimates the cost of partitioning to be approximately 5 percent of the cost of the switch.[47] Southwestern estimates that partitioning increases the cost to the STS providers by 6-7 percent.[48]

23. GTE states that PBXs generally can be partitioned and the cost of such partitioning is no more than 3,000 to5,000.[49] In contrast, STS supporters estimate much larger partitioning costs. IBM and many other parties argue that state partitioning requirements have deterred and will continue to deter STS development.[50]

24. ARINC states that "[t]he clearest evidence of the substantial cost of requiring STS switches to be partitioned consists of the fact that several major national STS firms have declined to provide service in states where partitioning is required."[51] RealCom says that it will not offer STS service in Oklahoma, North Carolina, Utah, and Florida, because those states have partitioning requirements.[52] Similarly, LinCom states that it will not provide STS where trunk pooling is not allowed.[53]

25. Some parties argue that a partitioning requirement makes STS economically unfeasible. Mass Communications states that the initial investment required for a partitioned switch arrangement frequently is as much as ten times the cost of constructing an unpartitioned switch arrangement.[54] Contel indicates that a proposed STS service for the Dade Florida Airport, planned to provide service for approximately 1000 phones, was discontinued because of a partitioning requirement imposed by Florida.[55] ARINC indicates that if the STS system at the Houston airport had to conform to partitioning requirements proposed by Southwestern, its cost would be prohibitive and ARINC would likely cease STS operations there.[56]

B. ***State Regulation of STS***

26. In the *NOI*, this Commission expressed concern that current state regulation of STS could discriminate against small users and disadvantage them compared to large users. We stated that "as a matter of Commission policy, restriction on the use of interstate services--whether imposed by regulation or telephone company tariff--that disables small firms from combining their telecommunications needs and resources in order to realize the efficiencies enjoyed by larger firms are generally not favored."[57]

27. Although, as shown in the record leading to the *STS Order*, partitioning requirements remain the most significant restriction for STS providers, the record before us indicates that other state regulatory requirements also limit the development of STS. For example, some states regulate entry of STS systems into LEC service areas, while other states require that "joint use" or shared service only be provided on a nonprofit basis. Other states prohibit STS systems from permitting calling "behind the STS switch, " *i.e.*, from one station in an STS system to another. Parties also extensively address state rate structures for STS systems and state limitations on the physical configuration, site, and ownership of STS systems, as discussed below.

1. STS Local Exchange Access Rates

28. Few states apply the same rates to both single-user PBXs and unpartitioned STS systems.[58] A number of states have higher rates for service to STS systems than those for similar single-user PBXs. Some states charge flat rates that are two to three times those for single user PBXs,[59] while others require that STS providers use measured or message rates, without the option to select flat rates often available to single user PBXs.[60]

29. In the *NOI*, we tentatively concluded that states should be permitted to establish rates designed to recover the costs that STS systems impose on the network.[61] However, we also expressed concern regarding possible rate discrimination. Many parties argue that there is no basis for the disparate charges imposed on unpartitioned STS systems and single user PBXs. ARINC argues that no one has identified any physical or technical difference between a multi-tenant PBX (used in an STS system) and a single-user PBX of similar size and capability. Therefore, ARINC claims, higher rates for STS trunks are based solely upon the identity of the end user rather than on costs and are therefore unreasonable and discriminatory.[62] Moreover, RCA Network argues that higher rates for STS systems are discriminatory because they are "in effect based on revenues allegedly lost rather than costs incurred."[63]

30. Ohio staff opposes higher rates for unpartitioned STS systems and states that "[t]he primary concern in these cases will be to determine if such rates are cost based (rationally related to higher STS systems usage), and to prevent undue discrimination."[64] Ohio characterizes an STS system as a large telecommunication user that should pay the same local rates as other large volume users.[65] GTE also contends that the same rate structure should apply to all PBX trunks.[66] Southwestern, which supports partitioning, states that it "knows of no technical difference between a multi-user STS and a single-user PBX of equivalent size in terms of these systems' use of local exchange facilities." [67]

31. However, parties opposed to preemption for unpartitioned STS systems argue that average flat rates were established based on a non-STS environment and that they should not, therefore, apply to unpartitioned STS systems.[68] In addition, since unpartitioned STS systems require fewer lines than partitioned systems, some of the LECs favor measured rates for unpartitioned STS systems in order to recover what they consider to be "lost revenue".[69] Thus, the willingness on the part of LECs to allow unpartitioned STS is conditioned on the availablity of tariffs that maintain revenues. The LECs also argue that without such tariffs, local rates will be deaveraged and such deaveraging will have a negative impact on universal service. In addition, the LECs add, revenue from subscriber line charges will decrease because of fewer trunks.

2. Size, Geographic and Ownership Restrictions

32. According to IBM, the most restrictive limitations include: (1) limitation of an STS system to one building; (2) restrictions on crossing of a public thoroughfare; and (3) requirements that STS end users be under common ownership, or common ownership, management, and control.[70] IBM argues that STS should be permitted to provide service in contiguous areas under common ownership, management or control, without regard to the presence of a public thoroughfare.[71]

33. Many states restrict the geographic area that an STS system can serve.[72] Other states impose limitations on the number of trunks, and the number of PBXs that an STS system can have. Several parties contend that STS systems are only efficient if they feature a substantial number of trunks.[73] IBM estimates the minimum number of trunks for a viable STS system to be 500 trunks. Thus, parties claim, state restrictions on the number of trunks permitted in STS systems, such as those of Georgia and South Carolina, limit the usefulness of STS systems to consumers.[74]

34. In Ohio, only the owner (or agent of the owner) of single or contiguous complex of buildings can provide STS, and only for that complex. In addition, the complex of buildings that a system serves must have a related purpose. Moreover, Ohio allows only one PBX in each STS system.[75]

35. According to FEA, such state STS system restrictions hamper the sharing of PBXs on military bases, since numerous entities are not eligible to share the base PBX. According to FEA, post exchanges, dormitory and resident houses, private contractors, coin telephones and

commercial establishments on bases are examples of concerns that are prohibited from such sharing.[76] However, some parties, particularly LECs and states, argue that these restrictions are necessary to limit STS systems from becoming "mini-LECs".[77]

C. *Legal Issues*

36. In the *NOI*, we tentatively concluded that we had the authority to preempt state regulation of STS systems if we determine that important federal interests are jeopardized and no other methods exist to protect these interests.[78] Although the record contains extensive comment on the feasibility of such preemption, parties to this proceeding did not address the applicability of the Supreme Court's *Louisiana* decision to STS issues, since the Supreme Court decided that case after the closing of the comment period.[79] Parties opposed to federal preemption argue that Sections 2(b) and 221(b) of the Communications Act proscribe federal jurisdiction over "charges, classification, practices, services, facilities, or regulations for or in connection with" intrastate communications.[80] Such parties argue that several Commission decisions acknowledge that we do not have power to preempt in this area.[81] NARUC argues that we cannot meet the legal requirements for preemption, since "the Commission may only preempt local services, facilities and disputes that in their nature and effect are inseparable from and substantially affect the conduct or development of interstate communications,"[82] and that STS systems are not in this category. NARUC contends that state regulation of STS does not "substantially affect" interstate communication because an STS system (partitioned or unpartitioned) can provide interstate service to the system's users without incurring any costs in addition to those of providing intrastate service. Cost savings that are not realized are those from the resale of intrastate service. Moreover, according to NARUC, CPE with all the advantages of unpartitioned systems can be purchased from many manufacturers.

37. Supporters of preemption for STS, however, claim that widespread availability of efficient service is an area of longstanding federal interest and jurisdiction.[83] They argue that state regulations implemented through partitioning require additional software, hardware and trunks that increase the cost of interstate service and have substantial effect on interstate communications. Preemption supporters also cite the difficulties that STS providers face in certain markets as evidence of the substantial effects on interstate service.

38. Moreover, supporters of preemption for unpartitioned STS contend that the Commission is obligated to ensure that new and efficient services, like STS, are made available to the public.[84] According to these parties, Sections 2(a) and 7 of the Communications Act[85] place the burden of proof on those who object to new technology or services. Other parties also argue that STS involves substantial federal interests because local exchange facilities are used for both incoming intrastate traffic and overflow outgoing interstate traffic and that such traffic typically represents a significant proportion of the total traffic from STS users.[86]

39. Parties argue that "the intrastate services at issue in this proceeding -- local exchange trunking and other services -- are no less essential to the origination and termination of interstate calls than intrastate WATS."[87] Proponents of STS preemption argue further that these issues of inseverability and the effect of state regulations on economic efficiency of interstate service are the same with respect to state regulations that require STS providers to acquire unneeded access lines as those that prohibit the interconnection of CPE that they could use to provide more efficient STS service.[88]

IV. NARUC'S MODEL POLICY FOR THE STATES

40. On February 25, 1987, the Committee on Communications of NARUC adopted an STS Model State Policy (the State Model). The State Model says in part that "STS systems are in the public interest because they provide tenants with innovative and cost-effective communications, information processing and other building services that would otherwise not be economically available." The State Model asserts that partitioning should not be required, "in order to enhance the efficient use of the network." The State Model definition of STS requires "continuous premises under common ownership or management, except that the premises may be intersected by public or private rights-of-way." Moreover, the State Model recommends reduced regulation of entry, rates, and services.

41. The State Model contains provisions designed to prevent discrimination against STS systems. For example, it states that "rates charged by a local exchange carrier to STS systems shall be based on cost and not on lost revenue by the carrier," and that the same rates shall apply to all comparably sized telecommunications systems, whether shared or unshared. On the other hand, the State Model also provides that LECs may require STS systems to procure local exchange trunks at measured service rates when measured service is available, even when non-sharers can obtain such trunks on a flat-rate basis. The State Model would also require the LEC to be "provider of last resort". NARUC adopted the State Model with the provision that changes could be made by each state to meet specific state needs.

V. DISCUSSION

42. The record in this proceeding indicates that real savings are attainable from the use of STS systems, and that those savings may, to some degree, be reduced through partitioning and other regulatory restrictions imposed by state commissions. There are significant federal interests in realizing such savings and in the effects of state regulation of STS on such savings.[89] We conclude, however, that these federal interests must be weighed against the concerns expressed by the states about the potential effect of STS systems on state policies governing the resale of basic local exchange service, as well as other intrastate services. As noted above, STS systems can be used for the resale of local basic service, a practice of traditional concern to state commissions. We have preempted state regulations regarding local resale only in very limited circumstances.[90] Partitioning of STS systems, the regulatory requirement that is the principal focus of most of the commenters in this proceeding, is one way that states enforce restrictions on local resale. Weighing our federal interests in STS development against state concerns about the potential effects of STS on state policies regarding the resale of intrastate services, we conclude that we should not take any preemptive action on the issues presented in the *NOI* at this time. There may

however, be individual factual circumstances where the federal interest is so significant that federal preemption would be warranted and the complaint process pursuant to Section 208 of the Communications Act is available in these instances.

43. Furthermore, our review of the record in this proceeding presents additional reasons supporting this decision. As we stated in the *NOI*, we are concerned that the replacement of diverse state regulations with a single federal policy for STS may create significant problems, since the problems with STS systems may be different from state to state. Thus, varying state responses may be appropriate. We suggested that states could act as laboratories to test various means of regulating STS that may in the long run result in the most efficient STS policies.[91] Since the release of the *NOI*, states have been exploring a variety of regulations involving STS that are tailored to their specific LEC and business environments. Most of the states do not require partitioning.[92] With more experience, states may develop regulations that do not impede STS development, but do protect LEC revenues. The State Model, which reflects sensitivity to efficiency issues in STS regulation, may influence states to adopt regulatory approaches that promote STS development. In light of this progress and our sensitivity to state interests in this area, we conclude that the appropriate federal role at this time is to observe the progress of state regulation of STS, and STS development and not assert a broad based federal preemption of state regulations in this proceeding. If we become aware of additional problems that potentially impede our interests in this area, we will revisit these issues in the future. Accordingly, we terminate this inquiry.

VI. ORDERING CLAUSES

44. Accordingly, IT IS ORDERED, that the motions of FEA, MTTA, and NATA described in note 6 above ARE HEREBY GRANTED.

45. IT IS FURTHER ORDERED, that pursuant to Sections 1, 4(i), 4(j), and 201-205 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 201-205, this DOCKET IS HEREBY TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Comments

Ad Hoc Coalition of STS Providers (Ad Hoc)

Aeronautical Radio, Inc. (ARINC)

Ameritech Operating Cos. (Ameritech)

Anchorage Telephone Utility (ATU)

Bell Atlantic Telephone Cos. (Bell Atlantic)

BellSouth Co. (BellSouth)

Bickerstaff, Heath & Smiley (Bickerstaff)

Cincinnati Bell Telephone Company (Cincinnati Bell)

Colorado Public Utilities Commission (Colorado)

Fairchild Communications Network & Services Company (Fairchild)

Federal Executive Agencies (FEA)

Florida Public Service Commission (Florida)

GTE Telephone Cos. (GTE)

Honeywell Inc. (Honeywell)

Idaho Public Utilities Commission (Idaho)

Independent Data Communications Manufacturers Association, Inc. (IDCMA)

InfoTran Co. (InfoTran)

International Business Machines (IBM)

International Communications Association (ICA)

International Intelligent Building Association, Inc. (IIBA)

Iowa State Commerce Commission (Iowa)

Kansas Corporation Commission (Kansas)

Mass Communications, Inc. (Mass Communications)

Missouri Public Service Commission (Missouri)

Mountain States Telephone and Telegraph Co., Northwestern Bell Telephone Co., and Pacific Northwest Bell Telephone Co. (US West)

Multi-Tenant Telecommunications Association (MTTA)

National Association of Regulatory Utility Commissioners (NARUC)

National Telephone Cooperative Association (NTCA)

New York State Department of Public Service (New York)

New York Telephone Co. and New England Telephone and Telegraph Co. (NYNEX)

North American Telecommunications Association (NATA)

Organization for the Protection and Advancement of Small Telephone Companies (OPATSCO)

Pacific Bell and Nevada Bell Telephone Cos. (Pacific)

People of the State of California and the Public Utilities of the State of California (California)

Peoples Counsel of the District of Columbia (DC Peoples Counsel)

Public Service Commission of the District of Columbia (District of Columbia)

Public Utility Commission of Ohio (Ohio)

Public Utility Commission of the State of Oregon (Oregon)

RCA Network Services, Inc. (RCA Network)

Southern New England Telephone Co. (SNET)

Southwestern Bell Telephone Co. (Southwestern)

Teleport Communications (Teleport)

Texas Public Utility Commission

Virginia State Corporation Commission (Virginia)

United States Telephone Association (USTA)

United Telephone System Inc. (UTS)

Replies

Ad Hoc Coalition of STS Providers (Ad Hoc)

American Institute of Architects (ATA) and the National Society of Professional Engineers (NSPE)

Aeronautical Radio, Inc. (ARINC)

Bell Atlantic Telephone Cos. (Bell Atlantic)

BellSouth Co. (BellSouth)

Bickerstaff, Heath & Smiley (Bickerstaff)

Colorado Public Utilities Commission (Colorado)

Fairchild Communications Network & Services Company (Fairchild)

Florida Public Service Commission (Florida)

GTE Telephone Cos. (GTE)

Honeywell Inc. (Honeywell)

Independent Data Communications Manufacturers Association, Inc. (IDCMA)

International Business Machines (IBM)

International Communications Association (ICA)

Kansas Corporation Commission (Kansas)

Mountain States Telephone and Telegraph Co., Northwestern Bell Telephone Co., and Pacific Northwest Bell Telephone Co. (US West)

Multi-Tenant Telecommunications Association (MTTA)

National Association of Regulatory Utility Commissioners (NARUC)

North American Telecommunications Association (NATA)

Organization for the Protection and Advancement of Small Telephone Companies (OPATSCO)

Pacific Bell and Nevada Bell Telephone Cos. (Pacific)

People of the State of California and the Public Utilities of the State of California (California)

People's Counsel of the District of Columbia (DC People's Counsel)

Public Service Commission of the District of Columbia (District of Columbia)

Southwestern Bell Telephone Co. (Southwestern)

Texas Public Utility Commission (Texas)

Teleport Communications (Teleport)

United States Telephone Association (USTA)

FOOTNOTES

[1] Policies Governing the Provision of Shared Telecommunications Service, CC Docket No. 86-9, *Notice of Inquiry*, 102 FCC 2d 1421 (1986) (hereinafter *NOI*).

[2] For a definition of partitioned switches, *see* paragraph 4, *infra*.

[3] *NOI*. at para. 2.

[4] International Business Machines Corporation, Request for Declaratory Ruling re State Regulation of Shared Telecommunication Service Systems, ENF 85-45 (filed May 16, 1985) (hereinafter IBM Petition).

[5] International Business Machines Corporation, *Memorandum Opinion and Order*, FCC 86-25, ENF 85-45 (released Jan. 27, 1986) (hereinafter *STS Order*).

[6] Appendix A contains a list of comments and replies filed in this proceeding. In the balance of this Order, we use the abbreviation for each commenter that appears in that Appendix. FEA and MTTA filed late comments and NATA filed late reply comments. Each of these parties submitted a motion to accept its pleading. In addition, MTTA filed a motion requesting permission to file fewer copies than specified in our rules of an attachment to its comments. No party opposed any of these motions. Since we find that no party has been prejudiced, we grant the motions and accept these pleadings. Bickerstaff, Heath and Smiley filed late an exhibit, the *Examiner's Report and Final Order of the Public Utility Commission of Texas*, to update materials previously submitted. We have considered this exhibit, however, parties should not expect this Commission to accept and consider routinely any exhibits or pleadings filed after the close of the pleading cycle.

[7] While parties extensively address the costs and benefits of partitioning when discussing state restrictions of STS, partitioning is generally not a requirement *per se*. Instead it is primarily a means of implementing a restriction on the resale of local services.

[8] *See, e.g.*, Ad Hoc Comments at 26-28, and 32; ARINC Comments at ii; Honeywell Comments at 4-5 and 9; NATA Comments at 5.

[9] *See* IBM Comments at 11, 13; Fairchild Comments at 1-2; Ad Hoc Comments at 12, 26.

[10] RCA Network Comments at 2.

[11] *See, e.g.*, Ad Hoc Comments at 12.

[12] *Id.* at 13, n. 7.

[13] *Id.* at 16-17.

[14] IBM Comments at 23.

[15] Ad Hoc Comments at 17.

[16] *See, e.g.*, ARINC Comments at 17-19; NATA Comments at 28-30; IIBA Comments at 1-2; Honeywell Comments at 14. However, Southwestern claims that tenants with partitioned STS systems, can control their telecommunication services better than tenants with unpartitioned systems because they can control the grade of service; choose their own listing and telephone numbers; select the inter-LATA carrier; and choose flat rate or measured service. Southwestern Bell Reply Comments at 22. UTS claims that a partitioned system has the same features as an unpartitioned system if it is appropriately configured and has the proper software. UTS Comments at 12.

[17] Fairchild Comments at 6.

[18] Honeywell Comments at 5.

[19] Mass Communications Comments at 5-7.

[20] US West Comments at 15.

[21] *See* Ad Hoc Comments at 33; IBM Comments at 33 & Appendix C, Tab 1 at 6 & 33.

[22] *See, e.g.*, Bell Atlantic Comments at A-4; Southwestern Comments at 23-26. Although the Bell Operating Companies (BOCs) generally oppose unrestricted provision of STS, some BOCs have provided similiar services through their *Computer II* separate subsidiaries. Second Computer Inquiry, *Final Decision*, 77 FCC 2d 384 (Final Decision), *modified on reconsideration*, 84 FCC 2d 50 (1980) (*Reconsideration Order*), *further modified on reconsideration*, 88 FCC 2d 512 (1981) (*Further Reconsideration Order*), *aff'd sub nom. Computer and Communications Indus. Ass'n* v. *FCC*, 693 F.2d 198 (D.C. Cir. 1982) (*CCIA* v. *FCC*), *cert. denied*, 461 U.S. 938 (1983), *aff'd on second further reconsideration*, FCC 84-190 (released May 4, 1984). The Modification of Final Judgment (*MFJ*) restricts the BOCs from offering a full range of the services available through STS by prohibiting BOC offering of interexchange services. *See, e.g.*, Ameritech Comments at 5-6; US West Comments at 9; NYNEX Comments at 18; Pacific Comments at Appendix. The *MFJ* was adopted in conjunction with *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). In 1987, referring to information in a motion filed by Ameritech, the Court stated that:

> among the benefits to tenants are the cost savings associated with the aggregated demand which, depending upon the pricing policies of the providers of the services, may permit these tenants to acquire customer premises equipment, exchange services, and interexchange services at lower, volume based prices. Tenants may also have available to them a broader range of products and services than would be true otherwise.

United States v. Western Electric Co., 627 F. Supp. 1090, 1098, n. 32. (1987). *See generally* Ameritech Motion to Provide Shared Tenant Services, Exhibit A, at 4-5.

The record in this proceeding was compiled prior to our actions removing the separate subsidiary requirement for BOC provision of enhanced services and CPE, as well as Judge Greene's most recent rulings on the *MFJ*.

[23] *See* BellSouth Comments at 4; GTE Comments at 26; NYNEX Comments at 14; Ohio Comments at 4-5; Pacific Comments at 2; Southwestern Comments at 4; USTA Reply Comments at 4; Iowa Comments at 3-5.

[24] BellSouth Comments at 4.

[25] *See* Bickerstaff Comments, attachments: Application of Southwestern Bell Telephone Company for approval of Tariff Revisions pertaining to Shared Tenant Services, Docket No. 6450 (Tex PUC); Testimony Gary E. Peacock, Appendix C (Aug 14, 1984); Letter to Peacock from Southwestern.

[26] *See , e.g.*, Ameritech Comments at 2-4; Southwestern Comments at 5-7; UTS Comments at 3-4.

[27] *See* Honeywell Comments at 5; BellSouth Comments at 4 n.3. Southwestern argues that these features are also available on partitioned STS systems. Southwestern Comments at 4.

[28] Bell Atlantic Reply Comments at 8 n.5. DID is service option in unpartitioned STS systems that permits a user to order a block of seven digit numbers using a reduced number of trunks in an efficient manner. DID is also available in partitioned PBXs but it may be too expensive for the small user.

[29] *See* Ameritech Comments at A-5; Southwestern Comments at 16-17.

[30] *See* BellSouth Comments at 4; Fairchild Comments at 6-7; Honeywell Comments at 8-9; NATA Comments at 16.

[31] *See* Bell Atlantic Comments at A-4; Southwestern Comments at 23-26.

[32] DC Peoples Counsel Reply Comments at 3-4.

[33] Pacific Comments at A-11; Ameritech Comments at A-7.

[34] Ameritech Comments at A-7.

[35] BellSouth Comments at 9.

[36] *See , e.g.* MTTA Appendix 4 at 6-12; US West Comments at 20; Mass Communications Comments at 13-14; IIBA Comment at 1-2; Honeywell Comments at 14; GTE Comments at 26; Ad Hoc Comments at 16-18; Fairchild Comments at 5- 6; ARINC Comments at 17-19; Southwestern Comments at 39; Pacific Comments at 27.

[37] *See* IBM Comments at 24, Appendix B at B-18; Mass Communications Comments at 13-14; NATA Comments at 29; RCA Network Comments at 8; Ad Hoc Comments at 17.

[38] IBM Comments at 24.

[39] IBM Reply Comments at 11.

[40] IBM Comments at 24. However, IBM uses flat trunk rates, which are not available in some jurisdictions. If measured rate service is used, as required in many jurisdictions that allow unpartitioned STS, the savings associated with unpartitioned systems would be less.

[41] NATA Comments at 29.

[42] Honeywell Comments at 14.

[43] Ad Hoc Comments at Exhibit 1.

[44] NATA Comments at Exhibit A.

[45] *See , e.g.*, GTE Comments at 26; Pacific Comments at 27; US West Comments at 20; Bell South Comments at 7; Southwestern Reply Comments at 20. *But see* IBM Comments at 24, Appendix B; Ad Hoc Coalition Comments at 17 and Exhibit 1; Mass Communications Comments at 13-14; NATA Comments at 29; RCA Network Comments at 8. Some estimates of the monetary cost of partitioning STS systems only include software and hardware, while others also include monthly trunk costs.

[46] Pacific Comments at 27; *see also* BellSouth Comments at 7.

[47] US West Comments at 20.

[48] Southwestern Reply Comments at 18.

[49] GTE Comments at 26.

[50] IBM Reply Comments at 14; IBM Comments at 26; Ad Hoc Comments at 16- 18; ARINC Comments at 18-19; Fairchild Comments at 8; Mass Communications Comments at 13-14; NATA Comments at 28-29.

[51] ARINC Reply Comments at 8.

[52] IBM Comments at 26.

[53] NATA Comments at 28; Comments of Gary Peacock, LinCom, at 2, attached to NATA Comments at Appendix H.

[54] Mass Communications Comments at 14.

[55] NATA Comments at Exhibit E.

[56] ARINC Reply Comments at 5 n.8.

[57] *NOI* at para. 14, n.11.

[58] *See* IBM Reply Comments at 15 n.40.

[59] *Id.* These include Arizona, Colorado, New Mexico, and Utah.

[60] *Id.*

[61] *NOI* at para. 42.

[62] ARINC Reply Comments at 6; Ad Hoc Comments at 21-23.

[63] RCA Network Comments at 9-10.

[64] Ohio Comments at 2.

[65] *Id.*

[66] GTE Comments at 16. According to IBM, Kentucky Public Service Commission concurs. IBM Reply at 16, citing Inquiry into Local Resale of Exchange Services by STS providers and COCOCT Providers, Admin: Case No. 293, Order (Kentucky PSC April 16, 1986) at 17-18.

[67] Southwestern does argue that there are economic and regulatory differences. Southwestern Comments at 21; *see also* UTS Comments at 6-7.

[68] BellSouth Comments at 8; GTE Comments at 12; SNET Comments at 4. Similar comments are made regarding the use of joint sharing tariffs by STS.

[69] *See e.g.*, Cincinnati Bell Comments at 4; GTE Comments at 12; Ameritech Comments at 6-7; BellSouth Comments at 8-9; NYNEX Comments at 3-4, 9, 15- 16; US West Comments at 6-7; Pacific Comments at 3-4.

[70] Common ownership, management, and control requires that the STS provider not only owns the building, but also performs management functions.

[71] IBM Reply Comments at 17.

[72] *See id.* The record indicates that STS systems are limited to one building in Missouri, and Florida is considering a similar requirement. In Colorado, Wyoming, and Wisconsin, STS cannot cross a public thoroughfare. Proposals to restrict ownership are under consideration in Tennessee, Mississippi, Virginia and Louisiana.

[73] *See id.* at 18 note 48; Ad Hoc Comments at 39; IBM Comments at 29 and n.69; Pacific Comments at A-11.

[74] Fairchild Comments at 7; IBM Comments at 29 note 68.

[75] Ohio Comments at 3.

[76] FEA Comments at 3.

[77] *See , e.g.*, Cincinnati Bell Comments at 3-5; USTA Reply Comments at 10.

[78] *NOI* at para. 7.

[79] *Louisiana Public Service Commission v. FCC*, 106 S. Ct. 1890 (1986) (*Louisiana*).

[80] *See , e.g.*, New York Comments at 2; District of Columbia Comments at 4; Iowa Comments at 2; Southwestern Comments at 43-44.

[81] *See* NARUC Comments at 1-2. *See also* Universal Payphone, *Memorandum Opinion and Order*, FCC 85-222 (released May 6, 1985) (*Universal Payphone)* at para. 16; Intrastate Telephone Surcharges, *Memorandum Opinion and Order*, Mimeo No. 5077 (released June 12, 1985) *(Hotel/Motel);* at para. 8; Registration of Coin Operated Telephones, *Memorandum Opinion and Order*, FCC 84-270, 49 Fed. Reg. 27763 (released June 25, 1984) *(Coin Operated Telephones)*.

[82] NARUC Comments at 4, quoting*North Carolina Utilities Commission v. FCC*, 537 F.2d 787, 793 (4th Cir.) *cert. denied*, 429 U.S. 1027 (1976) *(NCUCI). See also North Carolina Utilities Commission v. FCC*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977) (NCUC II.)

[83] *See* Ad Hoc Comments at 7,9-11; Honeywell Comments at 2-4; RCA Network Comments at 10-12; IBM Reply Comments at ii. *See also* Bell Atlantic Comments at 3.

[84] *See* IBM Reply Comments at 5; NATA Comments at 8-9. *See also*Earth Satellite Communications, Inc., 95 FCC 2d 1223, 1230-31 (1983), *aff'd sub nom. New York State Commission on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984); Digital Termination Systems, 86 FCC 2d 360, 390 (1981).

[85] 47 USC §§152(a), 157.

[86] *See* IBM Comments at 11-12 & Appendix B; Comments of MTTA, Appendix 4 at 10.

[87] RCA Network Comments at 4; ARINC Comments at 6. In affirming *Physically Intrastate WATS*, the Court held that the dividing line between the regulatory jurisdiction of this Commission and the states depends on the nature of the communications which pass through the facilities, and not on the physical location of those facilities. Thus, the Court concluded that purely intrastate calls may become subject to FCC regulation to the extent of their interstate use. Physically Intrastate WATS, 94 FCC 2d 1110 (1983), *aff'd sub nom., NARUC v. FCC*, 746 F.2d 1492, 1496 (D.C. Cir. 1984). Moreover, RCA Network says that the Court concluded in the *NCUC* cases and this Commission determined in *Telerent* that economic practicability was the test of separability. In *Telerent*, we indicated that separate CPE and lines for interstate and intrastate service would make no sense from an economic or operational standpoint. Telerent Leasing Corp., 45 FCC 2d 204, 217, 218 (1974) *(Telerent), aff'd* 537 F.2d 787 (4th Cir. 1976).

NCUC I and NCUC II upheld this Commission's authority to preempt state restrictions on interconnection of customer owned telephones to the public switched network. In *Telerent*, this Commission preempted state interconnection restrictions. This Commission took into account the need for additional loops and duplication of telephones required by state requirements in reaching our decision.

[88] *See* RCA Network Comments at 3-4; IBM Comments at 40-41; NATA Reply Comments at 29-30. *See also* Interconnection with Specialized Carriers in Furnishing Interstate Foreign Exchange (FX) Service and Common Central Switching Arrangements (CCSA), 56 FCC 2d 14, 19 (1975), *aff'd sub nom. People of the State of California v. FCC*, 567 F.2d 84 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1977); *CCIA v. FCC*.

[89] An STS system provides interstate, as well as intrastate, access to its end users. Thus, state regulations that restrain the growth of STS technology can adversely affect this Commission's interests in increasing the efficiency of the local network in originating and terminating interstate communications. For example, by reducing the number of lines or trunks between STS subscribers and the LEC network, an unpartitioned STS system enables subscribers to avoid unnecessary interstate subscriber line charges.

[90] *See STS Order* at paras. 9-13.

[91] *NOI* at paras. 35-36.

[92] *See* Antitrust Division, U.S. Department of Justice, *The Geodesic Network*, 2.13 (1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-467

In the Matter of

Regulation of Small Telephone Companies

Commission Requirements for Cost Support Material To Be Filed with 1988 Annual Access Tariffs

ORDER REQUESTING FURTHER COMMENT

Adopted: November 1, 1988; Released: December 6, 1988

By the Commission:

I. INTRODUCTION

1. On December 12, 1986, this Commission issued a Notice of Proposed Rule Making (*Notice*) [1] in response to a petition for Rule Making filed by the United States Telephone Association (USTA) to reduce regulatory burdens on small telephone companies. Several parties commented on our proposal. On June 29, 1987, we released our Report and Order (*Report and Order*) in this proceeding.[2] Petitions for reconsideration of the *Report and Order* have been filed by Alltel Corporation (Alltel), Century Telephone Enterprises, Inc. (Century), Contel Corporation (Contel), CP National Corporation (CP National), Telephone and Data Systems, Inc. (TDS), and USTA. Ameritech filed comments in support of the petitions for reconsideration, while oppositions were filed by MCI Telecommunications Corporation (MCI), the Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO), and the Independent Coalition. [3] Alltel, Contel, CP National, and USTA filed replies. The first tariffs to be filed under the new rules currently would have an April 1, 1989, effective date.[4]

2. On August 28, 1987, Alltel also filed an application for review of a Common Carrier Bureau action in Commission Requirements for Cost Support Material To Be Filed with 1988 Annual Access Tariffs, Mimeo No. 4219, released July 30, 1987 (*TRP Order*). Alltel objects to the provision of the *TRP Order* that separates Tier 2 carriers into two subsets based on the *Report and Order* in this docket. No comments were filed supporting or opposing Alltel's application.

II. BACKGROUND AND PLEADINGS

3. In the *Notice*, we proposed to reduce the regulatory burden on small telephone companies that choose not to participate in the National Exchange Carrier Association (NECA) pools but instead file their own access tariffs. We proposed to allow small companies to base their rates on historical cost and demand studies, to deem those rates presumptively reasonable, and to eliminate the data filing requirements and liabilities of the Part 65 rules[5] for small companies that base their rates on historical cost and demand. The *Notice* also sought comment on whether we should require NECA to file a simplified access tariff containing only terms and conditions which can be referenced by small companies, allow NECA to revise its traffic sensitive (TS) pool rates using statistical projections in off years for rate of return represcriptions rather than collect data from pool members, and require small companies to revise their tariffs every other year rather than every year. The *Notice* proposed to define small companies as those with not more than 50,000 access lines, applied at the study area level.

4. We adopted a modified version of these rules in the *Report and Order*. We reiterated that the relaxed regulation should be "rate neutral" in that small companies' access rates remain reasonable, as well as "pooling neutral" in that incentives to enter or leave the NECA pools should not be disturbed.[6] In addition, we concluded that a company should be permitted to use simplified procedures for a small study area even if a carrier or affiliated group of carriers would have more than 50,000 access lines if all study areas were aggregated.[7] Because we did not believe that the small company exception should extend to larger carriers, however, we modified the proposal of the *Notice* to exclude NECA subset 1 and 2 carriers.[8] We reasoned that large companies have sufficient administrative resources and economies of scale to meet existing tariff filing requirements, and noted that we would consider reduced regulation for larger carriers in a separate proceeding.[9]

5. We also reserved the authority to enforce our rate of return prescription. The *Report and Order* stated that the automatic refund and data filing provisions will continue to apply to periods during which tariffs were not based on historical costs and demand, even if the carrier later elects that option.[10] We further allowed average schedule companies to file rates based on the most recent average schedule formulas developed by NECA, and permitted small companies that elected to use projected costs and demand in setting their existing rates to likewise use projections in establishing rates for new services.[11] The new rules were appended to that *Report and Order*.

6. The petitioners object to various aspects of the rule changes, particularly Section 61.39 which excludes NECA subset 1 and 2 carriers from the relaxed regulation. The petitioners oppose the exclusion of subset 2 carriers as discriminatory.[12] They assert that the creation of the NECA subsets was based on a political compromise at the time NECA was established to assure small companies representation on the board of directors.[13] They note that the *Notice* specifically stated that it would apply the 50,000-line threshold at the study area level, not the holding company level.[14] Some petitioners submit that the subset 3 criterion will discourage mergers.[15] Those petitioners argue that several NECA subset 2 carriers have study areas which would be eligible for reduced regulation absent the subset 3 limitation, and maintain that, unlike subset 1 or subset 3 carriers, subset 2 carriers vary widely.[16] Some note that even if a carrier is affiliated with a larger holding company, costs must be allocated to each individual study area for collection, a practice burden-

some to small-staffed subset 2 carriers.[17] The petitioners maintain that these problems will increase as subset 3 carriers grow and become subset 2 carriers.[18]

7. In addition, the petitioners contend that the new rule deviates too sharply from the *Notice* and has therefore been promulgated without adequate notice in violation of the Administrative Procedure Act.[19] Some petitioners also argue that NECA should be allowed to use historical data, or should be permitted to use projections and remain subject to the Part 65 reporting and refund requirements.[20]

8. Parties filing oppositions assert that we provided adequate notice of the subset 3 limitation. Those parties argue that the *Notice* and the comments in response made obvious that the issue of eligibility for streamlined regulation had not been settled.[21] MCI notes that we clearly stated our intention not to apply such treatment to any but the smallest LECs.[22] The Independent Coalition observes that the specifics of a proposed rule are not necessary to effect adequate notice.[23] Various parties assert that the holding company limitation was a "logical outgrowth" of the debate over eligibility throughout the proceeding.[24]

9. Furthermore, these parties note that a LEC which is a member of a commonly-owned group has access to resources that make compliance with regulatory obligations less burdensome than for the independent LEC.[25] OPASTCO observes that few subset 3 companies have been able to maintain their own interstate TS tariffs.[26] In addition, while Century and TDS urge this Commission to allow NECA to file under the relaxed procedures, the Independent Coalition deems it significant that NECA has not petitioned for reconsideration.[27]

10. The replies generally reiterate the initial petitions, particularly regarding the exclusion of NECA subset 2 carriers from the reduced tariff filing requirements.[28] Even if the classification is proper, which they do not concede, the petitioners argue that they were not given adequate notice of the new rule.[29]

11. In its application for review of the *TRP Order*, Alltel argues that the Common Carrier Bureau mistakenly relied on the distinction drawn in the *Report and Order* in its separation of Tier 2 LECs into Tier 2A and Tier 2B companies. Alltel Application at 2. Alltel reiterates its objections to the *Report and Order*, and maintains that the use of the NECA subset dividing line is arbitrary in that subset 2 companies vary widely. *Id.* at 3-4. Alltel submits that the dividing lines between the NECA subsets do not correlate with a company's ability to fulfill tariff filing obligations, and that "affiliation" is not an appropriate criterion by which to distinguish companies. *Id.* at 5. As a result of the subset distinction, Alltel argues that its subsidiaries which file their own tariffs will face substantial regulatory burdens. *Id.* at 6. In addition, Alltel observes that the Common Carrier Bureau did not obtain public comment on the use of NECA subsets for Tariff Review Plan (TRP) purposes.

III. DISCUSSION

12. The United States Court of Appeals for the District of Columbia recently considered a method of classification similar to the procedure now before us on reconsideration. In *Alltel Corporation v. Federal Communications Commission*, 838 F.2d 551 (D.C. Cir. 1988) (*Alltel*), that Court granted petitions for review of our rules regarding LEC eligibility to use an average schedule method in determining costs attributable to the provision of interstate services. The challenged rule required an average schedule company affiliated with a cost company to convert to cost status if that company and its affiliates had aggregate annual revenues of 40 million or more. The Court noted that this is the figure used for classification of companies into subsets to determine representation on the NECA Board of Directors.[30] The *Alltel* decision held that we had not justified the use of the40 million limitation for determining average schedule status. While the Court agreed that the expense of performing cost studies is more burdensome for small carriers than for large carriers, it stated, "[t]he economy of scale appears to arise as a function of the size of the exchange carrier rather than as a function of the size of the affiliated group of carriers."[31]

13. In light of the *Alltel* decision, which was issued after the record was closed in this proceeding, we will afford NECA subset 2 carriers and other interested persons the opportunity to file comments in this docket explaining why such carriers should or should not be subject to reduced tariff filing requirements. Carriers or other persons may also propose alternative criteria for classifying carriers as small carriers for purposes of these rules. The petitions already filed in this proceeding will remain pending, to be supplemented by the carriers' further comments.[32]

14. To determine the extent of the burden imposed on subset 2 carriers by virtue of our tariff filing requirements, we seek the following information from subset 2 carriers, to be provided at both the holding company level and the operating company level:

> (1) What is the total annual dollar amount you spend to comply with this Commission's tariff filing requirements?
>
> (2) What percentage of your total annual operating budget for regulated activities does this figure represent? What percentage of your interstate annual operating budget for regulated activities does this figure represent?
>
> (3) What is the total number of staff hours you annually devote to fulfillment of these tariff filing requirements?
>
> (4) Are there any barriers applicable to your company which prevent affiliates of the larger holding company from receiving financial support and other resources from the holding company to ease the burden of these tariff filing requirements? If so, describe the nature of these barriers.

We require that responses to these questions be filed by Alltel Corporation, Century Telephone Enterprises, Inc., Contel Corporation, CP National Corporation, Telephone and Data Systems, Inc., the GTE Operating Companies, and United Telecommunications, Inc. Such responses shall be filed with the Secretary of this Commission **January 4, 1989.** Any other interested party who wishes to respond may do so by that date. Comments regarding these responses are due by **February 3, 1989.**

15. An original and seven copies of all pleadings shall be filed with the Secretary. In addition, one copy shall be delivered to this Commission's commercial firm for copying, International Transcription Service, Inc. (ITS), Room 246, 1919 M Street, N.W., Washington, D.C., 20554.

Members of the general public who wish to express their views in an informal manner on these issues may do so by submitting one copy of their comments to the Secretary, Federal Communications Commission, Washington, D.C., 20554. Such submissions should include the docket number of this proceeding in the heading.

16. In addition, because the *TRP Order* separates Tier 2 carriers into 2A and 2B companies based on the *Report and Order*, Alltel's application for review raises the same issues as the petitions for reconsideration discussed herein. We will therefore incorporate Alltel's application into the pleading cycle established above and will defer a decision pending consideration of further comments.

IV. EX PARTE REQUIREMENTS

17. For purposes of this non-restricted request for comment, members of the public are advised that *ex parte* presentations are permitted except during the "Sunshine Agenda" period. *See generally* Section 1.1206(a) of this Commission's Rules. The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. *See* Section 1.1202(f) of this Commission's Rules. During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by this Commission or Commission staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. *See* Section 1.1203 of this Commission's Rules.

18. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding; or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. *See* Section 1.1202(b) of this Commission's Rules. Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of that presentation to this Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in the person's previously-filed written comments, memoranda, or filings in this proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner of staff member involved) which summarizes the data and must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See* Section 1.1206 of this Commission's Rules.

19. All relevant and timely comments and reply comments will be considered by this Commission. In reaching our decision, this Commission may take into account information and ideas not contained in the comments, provided that such information or a writing containing the nature and source of such information is placed in the public file, and provided that the fact of this Commission's reliance on such information is noted in the Order.

V. CONCLUSION; ORDERING CLAUSE

20. Pursuant to our reconsideration of Regulation of Small Telephone Companies, CC Docket No. 86-467, 2 FCC Rcd 3811 (1987), we conclude that further comment is necessary regarding the propriety of excluding NECA subset 2 carriers from the reduction in tariff filing requirements based on our actions in this docket. We will address this issue in a subsequent Order in this docket after completing our analysis of further pleadings and information submitted in accordance with this Order.

21. Pursuant to our consideration of the application for review of Commission Requirements for Cost Support Material To Be Filed with 1988 Annual Access Tariffs, Mimeo No. 4219, released Aug. 28, 1987, filed by Alltel Corporation, we conclude that further comment is necessary regarding the separation of Tier 2 local exchange carriers into Tier 2A and Tier 2B companies based on the distinctions drawn in the small telephone company proceeding. We will address this issue in the forthcoming Order mentioned in paragraph 17, *supra*, after completing our analysis of further pleadings and information submitted in accordance with this Order.

22. IT IS THEREFORE ORDERED that, pursuant to Sections 218 and 403 of the Communications Act of 1934, 47 U.S.C. §§ 218 and 403, responses to the questions contained in paragraph 14, *supra*, shall be filed in conformance with the requirements established herein.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Regulation of Small Telephone Companies, CC Docket No. 86-467, Notice of Proposed Rule Making, 1 FCC Rcd 1206 (1986).

[2] Regulation of Small Telephone Companies, CC Docket No. 86-467, Report and Order, 2 FCC Rcd 3811 (1987).

[3] The Independent Coalition consists of Taconic Telephone Corporation, Elkhart Telephone Company, Ronan Telephone Company, Southland Telephone Company, Lewis River Telephone Company, Sweeny Old-Ocean Telephone Company, and Kalama Telephone Company.

[4] *See* Access Tariff Filing Schedules, CC Docket No. 88-326, FCC 88-283, Report and Order, released Sept. 14, 1988.

[5] *See* Authorized Rates of Return for Interstate Services for AT&T and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-257, released Mar. 24, 1986; *further recon.*, FCC 86-544, released Jan. 14, 1987. *See also* 47 C.F.R. §§ 65.1 - 65.703 (inclusive).

[6] *Report and Order*, 2 FCC Rcd at 3812.

[7] *Id.*

[8] *Id.* Subset 1 consists of all the Bell System Operating Companies other than Cincinnati Bell, Inc., and Southern New England Telephone Company; subset 2 consists of all other telephone companies with annual operating revenues in excess of 40 million; and subset 3 consists of all remaining telephone

companies. 47 C.F.R. § 69.602. For purposes of defining the subsets, all commonly-owned companies are deemed to be a single company. *Id.*

[9] *Id.*

[10] *Id.* at 3813.

[11] *Id.* at 3814.

[12] *See, e.g.*, Alltel Petition at 2; Century Petition at 10; Contel Petition at 16; CP National Petition at 4; TDS Petition at 9; USTA Petition at 9-10.

[13] Alltel Petition at 7; Century Petition at 13; TDS Petition at 11-12.

[14] *See, e.g.*, Alltel Petition at 2; Contel Petition at 5-6. We stated in the *Notice*, "We would apply this threshold at the study area level rather than at the narrower exchange level or the wider holding company level." *Notice*, 1 FCC Rcd at 1215 n.23.

[15] CP National Petition at 4; TDS Petition at 14.

[16] Alltel Petition at 5-6; Century Petition at 7, 14; TDS Petition at 6.

[17] Century Petition at 11; TDS Petition at 10.

[18] Alltel Petition at 13; Century Petition at 8; TDS Petition at 7.

[19] *See, e.g.*, Alltel Petition at 9-13; Contel Petition at 7-11; CP National Petition at 4-5; USTA Petition at 8 n.9; Ameritech Comments at 4.

[20] Century Petition at 16; TDS Petition at 14-15.

[21] MCI Comments at 4; Independent Coalition Comments at 9-12.

[22] MCI Comments at 4.

[23] Independent Coalition Comments at 7-9.

[24] *See, e.g.*, MCI Comments at 5.

[25] *See, e.g., id.* at 6-7 & n.3; Independent Coalition Comments at 17.

[26] OPASTCO Comments at 4.

[27] Independent Coalition Comments at 15.

[28] CP National Reply at 3; Contel Reply at 7-9; USTA Reply at 2. *See generally* Alltel Reply.

[29] Contel Reply at 5-6; CP National Reply at 3. The CP National Reply also urges us to strike MCI's opposition because MCI only served Contel and USTA, the two petitioners its filing addresses. CP National Reply at 1 n.1. Section 1.429(f) of this Commission's Rules, 47 C.F.R. § 1.429(f), provides that "[o]ppositions to a petition for reconsideration . . . need be served only on the person who filed the petition." It is therefore proper to consider MCI's opposition to the Contel and USTA petitions.

[30] *Alltel*, 838 F.2d at 556.

[31] *Id.* at 557.

[32] As several carriers observe, an erroneous set of revised rules was inadvertently published in the Federal Register. We subsequently published a corrected version and those rules are in effect. *See* Regulation of Small Telephone Companies, 3 FCC Rcd 5770 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of Certain
Broadcast Stations Serving
Communities in the States of
Michigan and Ohio

MEMORANDUM OPINION AND ORDER

Adopted: November 17, 1988; Released: December 6, 1988

By The Commission:

1. The Commission has before it for consideration: (i) a "Petition to Deny" filed September 1, 1987, by the National Black Media Coalition,[1] the Cleveland, Ohio, Branch of the National Association for the Advancement of Colored People (NAACP), the Columbus, Ohio, Branch of the NAACP, and the Grand Rapids, Michigan, Branch of the NAACP (hereinafter referred to as "NBMC/NAACP" or "petitioners") against the renewal applications of four broadcast stations serving various communities in the states of Ohio and Michigan;[2] (ii) opposition pleadings from the licensees; (iii) the petitioners' reply; and (iv) various related pleadings. [3]

2. **PROCEDURAL MATTERS.** Gaylord Broadcasting Company of Ohio, Inc. (Gaylord), licensee of WUAB(TV), and Christian Television of Ohio, (CTO), licensee of WSFJ(TV), challenge NBMC/NAACP's standing to bring the instant petition.[4] First, Gaylord and CTO contend that, because NBMC/NAACP failed to timely submit affidavits or statements from members who are viewers or residents of the service areas of the challenged stations,[5] or make a compelling showing for acceptance of the late filings, the petition must be rejected, or at most, considered an informal objection. Second, Gaylord contends that the statements submitted fail to demonstrate the requisite standing for either organization.[6]

3. Section 309(d)(1) of the Act states that a petition must allege specific allegations of fact sufficient to show that the petitioner is a party in interest as supported by affidavits or statements under penalty of perjury. 47 U.S.C. Section 309(d)(1); *see also American Legal Foundation v. F.C.C.*, 808 F.2d 84, 90-91 (D.C. Cir. 1987). Review of the statements reveals that they are made by NAACP members who are viewers of the challenged stations. The person submitting a statement for NBMC, however, is neither a viewer or resident within any of the challenged stations' viewing areas. Accordingly, we hold that each NAACP branch is a petitioner as to the station in its locale. NBMC, however, is held to be only an informal objector to each station. Lastly, we agree that the statements submitted by NBMC/NAACP were not timely filed. The explanation in support thereof, while not suggestive of abuse, reflects a continuing lack of diligence by NBMC/NAACP in complying with our procedural rules. In our recent decision concerning NBMC's challenge to the renewal applications of several Florida television stations, we stated that further failure by NBMC to comply with our procedural rules would not be countenanced. *Florida Broadcast Renewals*, 3 FCC Rcd 1923 (1988). However, since the decision on the Florida television stations was reached after the instant petition to deny was filed, we will accept the late-filed statements *nunc pro tunc*. *Malrite of New York*, 71 FCC 2d 241, 242 (1979).

4. **PLEADINGS.** NBMC/NAACP charge that the EEO programs and employment profiles of each of the stations reveal that the licensees have not complied with the Commission's EEO rule (Section 73.2080) or policies with respect to blacks and other minorities.[7] NBMC/NAACP contend that each of the stations hired few, if any, minorities throughout the 1982-1987 license term, failed to have meaningful equal employment opportunity programs, and failed to recognize deficiencies or propose steps to correct them.[8] NBMC/NAACP, therefore, request that the Commission investigate the EEO policies of the challenged stations pursuant to *Bilingual Bicultural Coalition on the Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*), [9] designate each application for an evidentiary hearing and deny each of the applications.

5. The licensees deny all the general allegations and maintain that the petitioners have failed to present evidence of noncompliance with the Commission's rules or policies sufficient to warrant inquiries, hearings or denial of the licenses. Accordingly, they request unconditional license renewals.

6. **DISCUSSION.** Section 73.2080 of the Commission's Rules requires that a broadcast licensee both refrain from employment discrimination and also establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. The Commission evaluates a licensee's efforts to implement its affirmative action program by reviewing all relevant and material information such as: the composition of the station's workforce; the composition of the local labor force; the description of the station's EEO program and policies, including recruitment and promotion data; and any EEO complaints filed against the station or licensee. In reviewing a station's employment profile, the Commission compares the station's workforce with the area's available labor force. Although all EEO programs are reviewed, a closer look is generally given to those stations not meeting the Commission's internal processing guidelines.[10] In the absence of discrimination, our primary concern is the broadcaster's efforts. When the evidentiary record indicates that the licensee is complying with our EEO rules and policies, the pending application is granted if otherwise appropriate. When the evidence indicates noncompliance by the licensee, the Commission may impose prospective sanctions such as the submission of periodic progress reports and/or renewal for less than a full term.[11] For less serious cases, the Commission may, in its discretion, simply issue warnings.

7. **Appropriate Labor Force.** Before discussing the allegations specific to each station, we must address NBMC/NAACP's contentions regarding appropriate labor force data for Stations WUAB(TV) and WSFJ(TV). With respect to WUAB, licensed to Lorain, Ohio, NBMC/NAACP maintain that the station's appropriate labor force is the Cleveland MSA rather than the Lorain-Elyria MSA. NBMC/NAACP argue that the station draws it employees and viewers from Cleveland and that the studio is located in Parma, a city within the Cleveland MSA. With respect to WSFJ, which is licensed to Newark, Ohio, NBMC/NAACP contend that the appropriate labor

force is the Columbus MSA because Newark is a Columbus suburb and the station operates essentially as a Columbus station.

8. The licensees disagree with NBMC/NAACP's view of the appropriate labor force for their respective stations. Gaylord argues that Lorain-Elyria labor force statistics should be used because the station is licensed to Lorain and the Lorain-Elyria MSA is a distinct statistical area. Moreover, the station previously has used the Lorain labor force statistics without question by the Commission or others as to their propriety. Citing *Indiana / Kentucky / Tennessee Broadcast Renewals*, 54 RR 1473, 1484 (1981) and *Chicago Broadcast Renewals*, 89 FCC 2d 1031, 1032 (1982), Gaylord contends the Commission looks to the community of license to determine the appropriate labor force. CTO, licensee of WSFJ, argues that Licking County, the county in which Newark is situated, is the appropriate labor force area rather than the Columbus MSA.

9. In response, NBMC/NAACP contend that the cases cited by Gaylord support the conclusion that the labor force is determined by where the station is located -- not where it is licensed.

10. The principal city to which a broadcast station is licensed is considered the station's location. 47 C.F.R. Section 73.1120. As our initial frame of reference in analyzing EEO efforts of broadcast stations, the Commission uses the labor force data of the MSA in which the station is located or, when the station is outside the MSA, the county in which the station is located. Only when a station provides a reasoned explanation for its use will a station be analyzed against alternative data. *See Broadcast EEO*, 2 FCC Rcd at 3973; *Indiana / Kentucky / Tennessee Broadcast Renewals, supra; Chicago Renewals, supra; Philadelphia Area Renewals*, 53 FCC 2d 104, 105 n.4 (1975). We reiterate, however, that comparison of a station's employment profile to the appropriate labor force is only the initial step of our review in order that our attention will be directed to those stations needing closer scrutiny. Our principal focus is on the station's efforts to recruit and promote qualified minorities and females, and to assure that equal opportunities are afforded to employees and job applicants. Thus, our final determination as to compliance with our rules is based on all of the relevant factors, and not merely on the application of the processing guidelines. WUAB is licensed to Lorain but, pursuant to a modification of license, has located its main studio in Parma, a suburb of Cleveland. WSFJ is licensed to Newark, Licking County, which was added to the Columbus MSA in 1983. Pursuant to a modification of license, WSFJ has located its main studio in Thornville, Perry County, which is not part of the Columbus MSA.[12] However, the appropriate labor areas for our comparison of the stations' workforces are the Lorain-Elyria MSA for WUAB and the Columbus MSA for WSFJ.

11. The factual allegations of the petition, excluding NBMC/NAACP's inferences and conclusions, are derived entirely from the stations' EEO programs and annual employment reports. Our review of those documents leads us to conclude that a prima facie case concerning non-compliance with our EEO rule was raised as to each of the stations.[13] However, after evaluating the four stations' EEO efforts in light of their oppositions, the petitioners' arguments, and the relevant labor force data for women and minorities, we find that no substantial and material questions of fact requiring a hearing are present. In addition, we find that the licensee of WSFJ generally complied with our EEO rule and policies and its EEO performance warrants no further inquiry or administrative sanction. Our conclusions with respect to the need for sanctions for other three stations are set forth in paragraphs 14-28. WSFJ(TV), Newark, Ohio.

12. Review of the EEO program indicates that the station contacted and received referrals during the May 19, 1986 - May 19, 1987 reporting period from the Ohio State University (3 referrals) and Fisher High School, Lancaster, Ohio (2 referrals). In addition, the station also conducted internship programs with both schools. During the reporting year, an Hispanic from the Fisher High School received training as a camera operator. As a result of on-the-job training, a black camera operator became proficient in floor directing and a female receptionist was promoted to Associate Producer. During the reporting year, another female was promoted to Assistant Production Manager. With respect to new hires, the EEO program indicates that the station hired only two employees, including one female. The station also maintains a volunteer staff of 274 people, an unspecified number of whom the licensee states are minorities. The Columbus MSA labor force includes 11% minorities (9.7% black).[14] The station's 1987 Annual Employment Report indicates that the station employed 22 full-time employees, of whom eight (36.3%) were women, and 16 upper-level employees, of whom three (18.8%) were women. None are minorities. The station, however, employed one black as a Sales Manager in 1983 and employed blacks as part-time camera persons throughout the license term. In addition, minorities were considered for other positions, including an on-air position.[15] Analyzing its recruitment, training and job hires, the licensee states that a sufficient number of women are applying for positions. Also, despite the near absence of minorities in Licking County, the licensee states that it strives to consider minorities for any available position. NBMC/NAACP contend, however, that, because the Annual Employment Reports and EEO program reflect no minority in a full-time position or sources geared specifically toward females and minorities, a *Bilingual* investigation is warranted.

13. Considering all of the pertinent factors, including the allegations raised by NBMC/NAACP, the composition of the labor force and the fact that there is no evidence that the station's affirmative action efforts were not sufficient, we find no substantial and material question of fact warranting further inquiry. Notwithstanding the relatively small staff size and few hiring opportunities during the license term, the licensee employed minorities and made efforts to recruit and hire minorities. While the station's minority employment appears low in comparison with the Columbus MSA labor force, we note that Licking County, in which Newark is situated, was not in the Columbus MSA during the station's previous license term, which ended in 1982. The 1982 license renewal application was reviewed in comparison with the Licking County labor data, which includes 1.5% minorities. Thus, at that time, the licensee was not required to file an EEO program concerning its efforts toward minorities because Licking County's minority population comprises less than 5% of the available labor force. 47 C.F.R. Section 73.2080. Use of Licking County employment data in previous filings also explains the licensee's self-analysis during the license term under review because the licensee apparently did not know that Licking County had been added to the Columbus MSA by the Office of Manage-

ment and Budget. Accordingly, now that the licensee has notice that Licking County is part of the Columbus MSA, we expect the licensee to make appropriate efforts towards Columbus in the future.

14. The EEO submissions of WUAB(TV), WXMI(TV) and WGVC(TV) indicate that the licensees did not fully comply with the Commission's EEO rule during the 1982-1987 license term. WUAB experienced a decline in black employment but took substantial steps to improve the program only at the close of the license term. WXMI and WGVC had few black employees during the license term, yet the licensees made few efforts to improve black representation at the stations. In some cases, minority recruitment sources were not contacted consistently whenever a vacancy occurred. Thus, the licensees did not adequately implement their recruitment programs. Also, when WXMI and WGVC did contact recruitment sources, they apparently did not track referrals obtained from these sources. Because the licensees did not address a decline in the employment of blacks or maintain the referral data, it does not appear that they engaged in meaningful self-assessment. Accordingly, while we find no substantial and material questions of fact requiring designation for a hearing, we will impose reporting conditions on the license renewals of these stations so as to assure ourselves that these inadequacies do not continue.

(a) WUAB(TV), Lorain, Ohio.

15. The station's EEO program indicates that it contacted numerous referral sources during the reporting period, including Spanish America for a Better Community (no referrals), Urban League of Cleveland (no referrals), Cuyahoga Community College (3 referrals), Cleveland State University (2 referrals), Lorain County Community College (3 referrals) and area newspapers, *Call & Post* and *Plain Dealer* (47 referrals). The station also provided on-the-job training and conducted internship programs with Lorain County Community College and Cleveland State University. As a result of on-the-job training, a female was among the three employees promoted during the reporting year. The EEO program indicates that the four employees hired during the reporting period (March 31, 1986 - April 4, 1987) included two women but no minorities. The licensee states, however, that the station had a black part-time intern during the reporting year. The Lorain labor force includes 10.7% minorities (6.2% blacks). The WUAB(TV) renewal Annual Employment Report shows a full-time staff of 85 employees, including six (7.1%) minorities of whom three (3.5%) were black, while its upper-level staff consisted of 61 employees, including four (6.5%) minorities of whom three (4.9%) were black. During the license term, overall employment declined by 24% from 113 employees in 1982 to 85 employees at renewal time. Employment in the upper-level positions also dropped from 82 employees in 1982 to 61 employees at the time of renewal, marking a 25% decline. The licensee states that it believes a sufficient number of qualified minorities and women are applying for available positions but adds that new and more effective recruiting sources are constantly being sought.

16. NBMC/NAACP argue that the licensee's conduct during the license term raises a question as to whether there was intentional discrimination or deliberate disregard of the Commission's EEO rule. NBMC/NAACP contend that, although the black organization contacted by the station did not produce referrals, the licensee failed to modify its EEO program. NBMC/NAACP maintain that the licensee failed to consider and include potentially productive referral sources, such as the local chapter of the National Association of Black Journalists and the Black Media Workers of Cleveland. NBMC/NAACP also argue that, even though minority employment at the station declined throughout the license term and the licensee did not hire blacks during the reporting period, the licensee attempted to minimize its statistically poor EEO showing. NBMC/NAACP charge that WUAB has the worst record for hiring blacks of any of the six Cleveland-area television stations.[16] Lastly, NBMC/NAACP contend that the station's post-term evidence, offered to suggest improvement in the station's hiring procedures, is not worthy of consideration because of the station's poor license term record.[17] Thus, NBMC/NAACP conclude that the Commission should conduct a *Bilingual* investigation[18] to resolve these issues and, if warranted, an evidentiary hearing to deny the application.

17. The licensee, however, contends that the station's EEO program has been and remains consistent with the Commission's policies. First, the licensee states that the station's record is free of any instances of actual discrimination and notes that the NBMC/NAACP failed to document any specific instance of discrimination.[19] Second, the licensee contends that its EEO program remained vital even during a period of contracting employment at the station. From 1985 through March 1987, the station hired only 12 new full-time employees (none of whom are identified as minorities). The licensee states that in filling these jobs, it sought referrals from minority organizations and publications as well as educational institutions with significant minority enrollment. Subsequent to the filing of the petition, the station hired a black Chief Photographer and a black Reporter, and plans to target minorities for positions created by the station's increased news commitment.[20] Lastly, the licensee states that, while neither referral source mentioned by NBMC/NAACP is listed in the telephone directory, the station plans to contact the sources for referrals for upcoming news positions.

18. Based on the evidence presented, we find no *Bilingual* inquiry is required because there is no substantial statistical disparity between the minority component of the labor force and the minority presence at the station, and WUAB's affirmative action efforts cannot reasonably be considered languishing. This case does, however, present us with the opportunity to clarify our policies relative to use of our processing guidelines. WUAB is licensed to Lorain, but locates its studios and offices in Parma, a close-in suburb of Cleveland. Thus, for EEO purposes, our review of the affirmative action efforts of WUAB initially includes measuring its employee profile against the labor force figures for Lorain.[21] While we find the licensee's comparison of its profile with labor force data for Lorain to have been appropriate, we also find that the licensee's EEO efforts and analysis of those efforts warrant monitoring.

19. During the license term, it appears that few minorities, particularly blacks, were hired or considered for employment. Also, the employment reports show that the percentage of black employment dropped during the license term. In 1982, blacks represented 6.2% of all the station's employees and 8.5% of the station's upper-level employees. By 1987, blacks accounted for only 3.5% of

all the station's employees and 4.9% of upper-level employees. Yet, of 12 hiring opportunities between 1985 and March of 1987, none was reported to be a minority. The station's EEO program does not address this decline nor indicate that the decline had been addressed prior to the March 31, 1986 to April 4, 1987 reporting period. Thus, in order to monitor the licensee's efforts, including its self-assessment, we will impose reporting conditions.[22]

(b) WXMI(TV), Grand Rapids, Michigan.

20. The EEO program filed by TV-17 Unlimited, Inc. indicates that the station contacted a variety of minority and female referral sources during the reporting period such as the Area Community Service Employment and Training Council, American Women in Radio and Television, Grand Rapids Inter-Tribal Council, La Boz Community Voice, and the *Grand Rapids Times*, and employment referral sources such as the Michigan Employment Security Commission, Wise Personnel and Hudson Personnel. The EEO program, however, does not note the number of referrals from these sources. The station also recruits prospective employees from educational institutions such as Grand Valley State College, Michigan State University, Grand Rapids Junior College, Central Michigan University, Ferris State College, Western Michigan University and Kent Skills Center. Additionally, the station conducts internship programs with the University of Tampa, Wooster College, Calvin College and Aquinas College, but because of insufficient resources, it does not provide on-the-job training for employees. Of the ten new hires during the March 1, 1986 - February 28, 1987 reporting period, six were women. None were minorities. Five employees, including four women, were promoted during the reporting period. The Grand Rapids MSA labor force includes 7.3% minorities (4.3% blacks). The amended WXMI renewal Annual Employment Report indicates that the station employed 42 full-time employees of whom one (2.4%) was Hispanic.[23] Of the 33 employees in the upper-level positions, none were minorities. During the license term, the station's staff grew from 29 to 43 full-time employees before leveling off at 42 employees at renewal time. In its opposition pleading, the licensee states that, in addition to the Hispanic female, the station employed a black employee as reflected in its 1985 filing, a black female sales secretary in 1983 and a black female switcher in 1984.[24] While the licensee believes that a sufficient number of qualified women are applying for available positions, it states that a sufficient number of minorities are not inquiring or applying. The licensee proposes to increase its use of the Michigan Employment Security Commission.

21. NBMC/NAACP contend that it is unclear whether the licensee implemented an affirmative EEO plan during the license term. NBMC/NAACP maintain that the EEO program does not list a black organization as a referral source, does not provide the number of referrals received from the sources listed and does not present evidence of minorities being offered training or scholarships. NBMC/NAACP also argue that the only referral source which the licensee plans to target during the upcoming license term provides referrals for lower-level positions. Because only eight of the station's 41 positions during the reporting year were lower-level positions, NBMC/NAACP maintain that this raises a question whether the licensee believes that it can meet its EEO obligation by hiring minorities only for the infrequently filled lower-level positions. Also, NBMC/NAACP maintain that the licensee's actions raise serious questions regarding the licensee's character that must be tested in a hearing.

22. The licensee, however, states that it made good faith efforts to attract and hire minorities. Initially, the licensee contends that its response to a Commission inquiry submitted prior to the filing of the petition[25] should dispel any misperception of the station's insensitivity to minority employment. Regarding NBMC/NAACP's contention that the station seeks minorities only for lower-level positions, the licensee states that the station "will intensely recruit minorities for job openings at every level." The licensee also contends that it must compete with larger, more established stations for a limited minority market in which many prefer to work for stations with greater internal promotion potential and prestige. Lastly, the licensee maintains that, while the EEO program did not produce the desired results, the station did put forth a good faith effort to implement its program, acknowledged that the program was not effective and proposed changes to cure the deficiencies. Maintaining that its EEO program, at most, reflects inadvertence, the licensee argues that its efforts warrant renewal of its license.

23. In making a determination of adherence to our EEO rule, the Commission looks at a station's overall employment and at employment in the upper-four job categories. *E.g., Miami Valley Broadcasting Corp., supra.* Considering all pertinent circumstances, including the absence of any evidence of discriminatory placement of employees, the licensee's occasional use of minority (including black) recruitment sources, and the relatively small percentage of minorities in the Grand Rapids MSA labor force, we find that the licensee did not violate the nondiscrimination provision of our EEO rules. We are concerned, however, that the licensee appears to have made few efforts to recruit minorities for upper-level positions. Moreover, in view of the licensee's failure to keep track of the number of referrals it obtained from its recruitment sources, it does not appear that the licensee possessed the necessary information to engage in an ongoing self-assessment of its EEO efforts. *See Baltimore Metropolitan Broadcast Stations*, 89 FCC 2d 1183 (1982). Accordingly, in order to monitor the licensee's efforts, including its self-assessment, we will impose reporting conditions.[26]

(c) WGVC(TV), Grand Rapids, Michigan.

24. Review of the EEO program filed by Grand Valley State College (College) indicates that WGVC contacted numerous referral sources, including all four-year colleges in Michigan, the Women's Resource Center, the Hispanic Center of Western Michigan, the Urban League, the Grand Rapids Job Corps Center, Michigan Rehabilitation Services, the Grand Rapids Area Employment and Training Council, the Michigan Employment Security Commission Job Services, and local publications such as Grand Rapids *Press*, *The Voice*, and Muskegon *Chronicle*. In addition, the College advertises higher-level positions nationally in trade journals such as *Broadcasting* and *Current* as well as by wire service to all noncommercial stations. The College also advertised in Detroit and Chicago newspapers, the Black Broadcasters' Association and the Placement Offices of Howard University and Central State University, two predominately black institutions.[27] Due to its lack of resources, the station did not provide on-the-job training for employees. During the reporting

period ending March 31, 1987, the College hired 12 employees, including two minorities and five women. Based on an analysis of its recruitment techniques, job applications and new hires, the licensee states that a sufficient number of minorities and women are applying for "certain types" of available positions. The licensee states that the station is always looking for new or additional minority and female recruitment sources. The licensee also states that the station will continue to seek new and creative ways to attract women and minorities for administrative and management positions as well as funding for training. The licensee believes that training may also serve to aid in the retention of women and minorities.

25. Comparison of the station's full-time staff with the Grand Rapids labor force (7.3% minorities, including 4.3% blacks) indicates that the station employs 38 employees, of whom four (10.5%) are minorities, including two (5.3%) blacks and 31 employees in the upper-three[28] positions of whom two (6.5%) were minorities. The station employed no blacks in the upper-three job categories. Review of the station's Annual Employment Reports reveals that the station grew from 31 full-time employees in 1982 to 38 employees during the reporting period, and that employment of blacks increased from none in 1982 to two employees at renewal time. In the upper-level jobs, however, the station reports only one black throughout the license term – in 1983.

26. NBMC/NAACP criticize the licensee for indicating in its EEO program that a sufficient number of minorities are applying for positions and for not proposing any specific action to recruit or hire blacks for upper-level positions even though the station's employment profile reflects low black employment. NBMC/NAACP also maintain that the licensee failed to fully disclose information on two discrimination complaints filed against the station. Without more evidence as to how and whether the EEO program operated during the license term, NBMC/NAACP maintain that the renewal application must be designated for hearing.

27. The licensee maintains that the station has substantially complied with the Commission's EEO guidelines. The licensee notes that the station experienced an overall increase in the number of women and minority employees since 1982 and states that it saw no necessity to target any particular minority group for special attention. Moreover, the licensee argues that the Commission's rules focus on the licensee's overall efforts rather than the station's statistical profile, and it maintains that it made good faith efforts during the license term. As for the discrimination charges, the licensee states that the charges were resolved without a determination of discrimination.

28. Review of the licensee's EEO record indicates that the College made some efforts to recruit and employ blacks and other minorities. We find that no *Bilingual* inquiry is warranted because there is no substantial statistical disparity between the minority component of the local labor force and the minority presence at the station and the licensee's EEO program cannot reasonably be characterized as "languishing." However, the licensee did not fully analyze its recruitment efforts, particularly for the upper-three job categories, and was in no position to know that modification of its employment practices was necessary with respect to upper-level employment. Without knowing the number of referrals received from its recruitment sources, the licensee could not adequately assess its recruitment efforts. *See Baltimore Renewals, supra*. Moreover, self-assessment throughout the license term would have revealed shortcomings in the recruitment of blacks for upper-level positions. We wish to emphasize that where, as here, a licensee has not been successful in such recruitment, it should reassess and try new and varied sources. Accordingly, to ensure that appropriate efforts, including self-assessment, are undertaken by the licensee, we will impose reporting conditions.

29. Accordingly, IT IS ORDERED, That the petition to deny filed by the named Ohio and Michigan Branches of the NAACP and the informal objection filed by the National Black Media Coalition IS DENIED.

30. IT IS FURTHER ORDERED, That the license renewal application for Station WSFJ(TV) IS GRANTED.

31. IT IS FURTHER ORDERED, That the license renewal applications of Stations WUAB(TV), WXMI(TV) and WGVC(TV) ARE GRANTED, subject to the EEO reporting conditions specified herein.

32. IT IS FURTHER ORDERED, That the licensees of Stations WUAB(TV), WXMI(TV) and WGVC(TV) file an original and one copy of the following information on July 1, 1989 and 18 months thereafter, on January 2, 1991, setting forth the following information for each vacancy filled:[29]

(a) a list of all job vacancies filled during June 1, 1988 through May 31, 1989 for the first report and June 1, 1989 through November 30, 1990 for the second report, indicating the job title, the full-time and part-time status of the position, referral or recruitment source of each applicant, FCC Form 395 classification, date of hire, and the sex and race or national origin of the person hired;

(For example: Job Title: News Reporter (Part-time)
Applicants and Referral Sources

white female	*Broadcasting* magazine
black female	Urban League
white male	newspaper ad
Selected:	black female 9/01/88)

(b) a list of employees as of May 31, 1989 for the first report and employees as of November 30, 1990 for the second report by job title, indicating part-time or full-time status, (ranked from highest to lowest paid), FCC Form 395 classification, date of hire, sex and race or national origin; and

(c) a narrative statement detailing the efforts to recruit for each position filled during the specified periods, including identification of sources used for the purpose of increasing the station's pool of black applicants, whether any of the applicants declined actual offers of employment and an analysis of their effectiveness.[30]

33. IT IS FURTHER ORDERED, That the Mass Media Bureau send by Certified Mail – Return Receipt Requested one copy of this Memorandum Opinion and Order to the National Black Media Coalition, the NAACP branches mentioned herein and to each of the licensees.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The National Black Media Coalition (NBMC), headquartered in Washington, D.C., is a national association of black organizations and persons seeking additional black employment, program service and ownership in the media. The petition was filed by NBMC and NAACP members who are viewers of the challenged stations.

[2] NBMC/NAACP initially filed the instant Petition to Deny against the following stations: WUAB(TV) (BRCT-870529LA), licensed to Gaylord Broadcasting Company of Ohio, Inc., Lorain, Ohio; WSFJ(TV) (BRCT-870528KM), licensed to Christian Television of Ohio, Inc., Newark, Ohio; WIII-TV (BRCT-870610KE), licensed to Channel 64 Joint Venture, Cincinnati, Ohio; WXMI(TV) (BRCT-870518KE), licensed to Channel 17 Unlimited Inc., Grand Rapids, Michigan; and WGVC(TV) (BRET-870527KE), licensed to Grand Valley State College, Grand Rapids, Michigan. Thereafter, NBMC withdrew its challenge against WIII-TV, filing a joint motion for withdrawal of the petition to deny with Channel 64 Joint Venture, Inc., licensee of WIII-TV and debtor-in-possession pursuant to a bankruptcy proceeding, and Channel 64 Acquisition, Inc., proposed assignee of the license. The Commission's staff, pursuant to delegated authority, has reviewed the station's EEO performance and determined that no further inquiry was warranted. Although NBMC also withdrew its challenge against WXMI(TV), the review of the station's EEO performance raised concerns which are set forth in paragraphs 20-23. Lastly, WGVC changed its call sign to WGVU on December 12, 1947. For purposes of this order, the station will be referred to as WGVC.

[3] We will consider all submissions not authorized by Section 1.45 of the Commission's Rules only to the extent required by our public interest mandate.

[4] In addition, Channel 17 Unlimited, Inc. (CUI) contends that the petition is a "nullity" due to the petitioners' unexplained failure to serve all parties as indicated in the certificate of service. NBMC/NAACP maintain that all parties were served in accordance with the petition's certificate of service, which reflects service by mail. Because such service is complete upon mailing (Section 1.47(f) of the Commission's Rules), which NBMC/NAACP affirm was done, CUI's argument is without merit.

[5] Initially, NBMC/NAACP did not file with the petition affidavits or statements under penalty of perjury. On September 29, 1987, NBMC/NAACP submitted statements under penalty of perjury from the following: Pluria Marshall, who is Chairman of NBMC and a resident of Silver Spring, Maryland; James Hardiman, President of the Cleveland Branch of the NAACP, a resident of Cleveland, Ohio, and a viewer of WUAB(TV); Melanie Mitchell, President of the Columbus, Branch of the NAACP and a viewer of WSFJ(TV); and Rev. Willie Applewhite, President of the Grand Rapids Branch of the NAACP, a resident of Grand Rapids, Michigan, and a viewer of WGVC(TV) and WXMI(TV). NBMC/NAACP claim that they did not have sufficient time to obtain the statements prior to the filing of the petition, and they urge that the statements be accepted because they were served on all counsel before the deadline for opposition pleadings and no prejudice will result from acceptance.

[6] With respect to NBMC, Gaylord contends that Pluria Marshall's statement is insufficient to establish standing because Mr. Marshall does not claim to be a local resident or a viewer of WUAB(TV), fails to identify specific NBMC members residing in WUAB's service area, and fails to indicate whether any NBMC members are viewers of the station, sought employment, were rejected for employment or likely to seek employment at the station. Although Gaylord also contends that James Hardiman's statement does not demonstrate the requisite associational standing, we find that Mr. Hardiman's residence in WUAB(TV)'s service area, his unchallenged assertion of viewership of WUAB(TV), and his status as President of the Cleveland Branch of the NAACP establish the Cleveland Branch's standing.

[7] The petitioners did not challenge the licensee's employment practices with respect to women. Nevertheless, we have examined them and found them adequate.

[8] NBMC/NAACP note that, while several licensees refer to their program service in an effort to bolster their EEO programs, the programming does not mitigate the licensees' failure to abide by the Commission's EEO rule and policies. *Cf. Louisiana / Mississippi Broadcast Stations*, 94 FCC 2d 275, 283-84 n. 19 (1983).

[9] While NBMC/NAACP recognize that *Bilingual* states that a *substantial* statistical disparity, combined with a languishing EEO program, raises questions that may require additional information before license renewal can be granted (*Bilingual, supra*, at 629-630), NBMC/NAACP maintain that such inquiries are warranted when the stations are operating barely above the FCC's processing guidelines. *See EEO Processing Guidelines*, 46 RR 2d 1693, *recon. denied*, 79 FCC 2d 922 (1980).

[10] In *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987) (*Broadcast EEO)*, we stated that all EEO programs would be thoroughly reviewed, regardless of whether a station's profile came within the processing guidelines, and that these guidelines were being used primarily for administrative efficiency.

[11] If factual questions remain after our initial review, we will conduct an inquiry or investigation. If, after this process, the factual questions persist and are substantial and material, we will designate the application for hearing. *Id.; See also Bilingual, supra*, (the Commission may conduct an inquiry if there is a substantial statistical disparity and the licensee's EEO program can reasonably be characterized as "languishing.")

[12] In 1987, the Commission amended the main studio location rule, 47 C.F.R. Section 73.1120, to permit a broadcast station to locate its main studio outside its community of license at any point within the station's principal community contour. The main studios of WUAB and WSFJ are within their stations' principal community contour.

[13] Section 309(d)(1) of the Communications Act of 1934, as amended, 47 U.S.C. 309(d)(1). *Astroline Communications Co. v. FCC*, F.2d (D.C. Cir. Sept. 27, 1988).

[14] The preliminary statistical analysis results from a comparison of the percentage of *all* minorities on the station's staff with the percentage of *all* minorities in the relevant labor force. *Michael Mathiesen*, 55 RR 2d 997, 1002 (1983); *Storz Broadcasting Co.*, 88 FCC 2d 641, 642 (1981). Because blacks are the largest minority group in the labor force relevant to each of the challenged stations, representing at least 58% of the minorities in those labor forces, and their treatment is the focus of the

petition to deny, our principal concern is with each station's efforts with respect to blacks. *Bilingual, supra; Pyle Communications of Beaumont*, 2 FCC Rcd 1793 (1987), *appeal filed sub nom. Beaumont Branch of the NAACP and National Black Media Coalition v. Federal Communications Commission*, No. 87-1188 (D.C. Cir., April 17, 1987); *Metroplex Communications of Florida, Inc.*, 96 FCC 2d 1090 (1984). We also examine the licensees' EEO submissions to assure ourselves that appropriate affirmative efforts were made with respect to all minority group members. *Bilingual, supra* at 625, n. 7. *See also Chicago Metropolitan Broadcast Stations, supra.*

[15] By affidavit, Betty J. Stanley, Vice President of CTO, states that the black hired as Sales Manager was terminated when his position was abolished based on a station policy change to eliminate commercials. Ms. Stanley also states that one black applicant was asked to co-host a locally produced program but declined the full-time position because he sought only part-time work. Another black applicant, who was a second choice for a different position, was later offered the position when it reopened but declined it.

[16] The Cleveland area stations referenced by NBMC/NAACP include: WKYC-TV, WEWS-TV, WJW-TV, WVIZ-TV, all licensed to Cleveland, WQHS-TV, Shaker Heights, and WUAB(TV), Lorain.

[17] In its supplemental study submitted in conjunction with the license renewals of several Ohio stations serving the Cleveland area, NBMC/NAACP point out that the three blacks employed in upper-level positions at WUAB(TV) during the reporting period worked only in technical positions. Thus, NBMC/NAACP maintain that no blacks or other minorities were employed in decision-making positions involving programming, hiring or terminations. As we noted in *Carolina Radio*, 74 FCC 2d 571 (1979), the Commission looks at a station's overall employment, including all upper-four job categories, rather than only one job category in making a determination of adherence to our EEO rule. *See, e.g., Miami Valley Broadcasting Corp.*, 86 FCC 2d 776 (1981). While we note that WUAB's black employees worked as technicians during the reporting period, we also note that blacks worked in the professional and sales worker categories at other times during the license term. Based on the evidence submitted, we find that the upper-level employment of blacks as technicians in 1986 and 1987 raises no substantial and material question of fact warranting further inquiry.

[18] In *Bilingual, supra*, the court stated that a substantial statistical disparity between the available minority workforce and a station's minority employment, coupled with a languishing affirmative action plan, raises questions as to whether the station's poor EEO performance is due to inadvertence or to intentional discrimination. The court made clear, however, that the Commission could gather more information regarding these issues through its own investigation. *Id.* at 630; *See National Black Media Coalition v. FCC*, 775 F.2d 342, 358 (D.C. Cir. 1985).

[19] On July 13, 1984, an employee filed a discrimination charge against the station with the Equal Employment Opportunity Commission, alleging race and age discrimination. On May 20, 1985, the EEOC informed the station that the employee withdrew the charges. The employee still works at the station.

[20] In the spring of 1987, the station decided to produce a weekday prime-time newscast to debut in the fall. To carry out this undertaking, the licensee plans to focus attention on hiring qualified minorities to fill some of the 24 anticipated positions, including the position of News Anchor.

[21] It should be noted, however, that when a licensee voluntarily moves its studio location, including main studio, from its community of license to an area of higher minority concentration, we will take cognizance of that fact in assessing the adequacy of its overall EEO efforts. On the other hand, we will not permit licensees to avoid their EEO responsibilities to their community of license by claiming that their new location includes fewer minorities than does their community of license.

[22] In addition to the above, we note that the labor force of WUAB's main studio location contains a significantly larger minority component than the labor force of the station's community license. In fact, as a consequence of a study of television stations in the Cleveland area (Cleveland MSA contains 17.8% minorities, 15.8% black; Lorain MSA contains 10.7% minorities, 6.2% blacks) conducted by the Cleveland Branch of the NAACP and the NBMC/NAACP petition, WUAB itself recognized that its proximity to Cleveland reasonably required additional EEO efforts. WUAB has now indicated its intent to increase its minority employment in order to be more representative of the available market and hired two blacks at the end of the license term. Should the licensee continue to maintain its main studio near Cleveland -- an area with a larger minority presence than Lorain -- we will, in future license renewal proceedings, review its efforts in light of the larger minority presence.

[23] In response to a Commission inquiry, the licensee states that, initially, an Hispanic female was not included in its renewal application because she was hired prior to the reporting period in a part-time position, then promoted to a full-time secretarial position during the reporting period. Thus, the licensee maintains that it did employ a minority on a full-time basis during the reporting period.

[24] In its opposition, the licensee states that the black employees were not reflected in the annual report filings because they were not employed at the station during the pay periods used for reporting purposes.

[25] On August 5, 1987, the Commission's staff sent an inquiry to the licensee based on questions arising from the station's renewal filing. The licensee responded on August 31, 1987. NBMC/NAACP filed its petition on September 1, 1987. The licensee served a copy of its response on NBMC/NAACP. The licensee's submission reveals that the licensee contacted a black publication and several minority referral sources during the reporting period. The licensee also employed three minorities during the reporting period: a full-time Hispanic secretary/receptionist, a temporary part-time black secretary/receptionist, and a part-time black intern. The black temporary secretary turned down an offer for a full-time position subsequent to the licensee's filing of its renewal application.

[26] Subsequent to the filing of the instant petition, the licensee of WXMI filed for authorization to transfer control to USTV of Michigan, Inc. Thus, the transferee will be obligated to comply with the reporting conditions imposed herein. *Equal Employment Oportunity Program of Broadcast License Applicant, The Baltimore Radio Show, Inc. for Station WFBR, Baltimore Maryland*, FCC No. 88-300 (Nov. 17, 1988).

[27] We note that the licensee does not indicate if any of the listed sources produced any applicants.

[28] WGVC(TV) is a non-commercial entity and thus employs no sales staff in the upper-level positions.

[29] Upon submission of the first report, the Commission's staff will review each licensee's EEO performance, and if it is determined that a licensee has developed an effective EEO program, the staff will advise the licensee that a second further report will not be required. Otherwise, the second report will be required.

[30] The licensees may contact the EEO Branch of the Mass Media Bureau's Enforcement Division (202-632-7069) for information on the preparation of employment reports. We advise each licensee that it need *not* submit the names of the persons referenced in its reports; the identifying information specifically requested will suffice.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

ARCO File Nos. 744035 and 744036
COMMUNICATIONS, INC.
Valley Forge and
Newton Square
Pennsylvania

For a Waiver of the Rules to Allow
the Use of a Category B OFS Antenna
in a Congested Area

WAIVER

Adopted: November 22, 1988; Released: December 6, 1988

By the Chief, Land Mobile and Microwave Division:

1. ARCO Communications, Inc., (ARCO),[1] seeks a waiver of Section 94.75 of the Commission's Rules, 47 C.F.R. § 94.75, to permit the use of a Category B antenna in a congested area. Section 94.75(a) requires that OFS antennas used in congested areas meet or exceed the Category A standards (directional antenna performance standards for parallel polarization) set forth in Section 94.75(b).

2. ARCO has filed the captioned applications in the private operational fixed microwave service (OFS), requesting authority to modify an existing 1.9 GHz link between stations WHC-372 and WIA-972, both located in southeastern Pennsylvania. ARCO seeks to use an antenna at its Valley Forge site (station WHC-372), meeting the Category B standards for beamwidth and sidelobe suppressions as specified by Section 94.75(b). The path between WHC-372 and WIA-972 is located in a congested area.

3. ARCO currently operates station WHC-372 with a ten foot parabola or dish antenna that meets the specifications for Category A antennas. ARCO states, however, that the owner of the tower, where ARCO leases space for WHC-372, notified it recently that the lease specifies that only a six foot dish may be used. ARCO states that the lessor will not renegotiate the lease, and has insisted that ARCO comply with the lease by promptly replacing the ten foot antenna with a six foot dish. ARCO states that the information carried by this OFS facility is critical to it and its parent company's operations, and pleads that it has been unable to relocate station WHC-372 with the ten foot antenna. ARCO, thus, pleads that its only alternative is to pursue the use of a six foot dish.

4. ARCO states that it is proposing to use a six foot antenna model (Andrew PL6-17C), that most nearly mimics a Category A antenna. ARCO states that this antenna provides a 60 beamwidth while other antennas meeting the Category B criteria have beamwidths as high as 80. ARCO pleads that Section 94.75(b) requires a bandwidth not greater than 50 to meet Category A, and that its proposed operation would not significantly exceed this requirement.

5. Section 94.75 was adopted to provide for the most efficient use of the spectrum in congested areas, by requiring the suppression of unwanted sidelobe radiations. In this case, however, ARCO is proposing to use an antenna with an off-axis attenuation generally only 3 db less than that required by the Category A standards. The difference in gain between the antenna ARCO proposes and that of a minimally acceptable Category A antenna is also approximately 3 db. If ARCO, thus, employed a minimally acceptable Category A antenna, the better sidelobe suppression associated with it would be offset by its higher gain. Accordingly, assuming a constant transmitter output power, the interference level to co-channel systems would be approximately equal using either a minimally qualified Category A antenna or the Category B antenna ARCO proposes. ARCO has demonstrated, furthermore, by a frequency engineering analysis, that its proposed operation would not cause harmful interference to systems existing or proposed on or before June 24, 1988. It does not, therefore, appear necessary in this case to require ARCO to operate with an antenna that meets the Category A criteria with respect to off-axis attenuation.

6. ARCO has shown a unique need in this case and appears to have no other alternative within the Rules. Since the proposed system appears to be the only alternative available and would allow ARCO to continue transmitting information that is critical to its operation, without undermining the purpose of the Rule, which is to prevent an inefficient use of OFS spectrum in congested areas, we find the operation proposed to be in the public interest. *Thomas Radio v. FCC*, 716 F.2d 921 (D.C. Cir. 1983); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

7. Accordingly, pursuant to Section 0.331, 47 C.F.R. § 0.331, and Section 1.3, 47 C.F.R. § 1.3, ARCO Communications, Inc.'s request for waiver of Section 94.75 for the referenced applications IS GRANTED for an indefinite term, subject to the condition that no harmful interference be caused to existing or future systems.[2]

FEDERAL COMMUNICATIONS COMMISSION

Richard J. Shiben
Chief, Land Mobile and Microwave Division

FOOTNOTES

[1] ARCO Communications, Inc. is a wholly-owned corporate subsidiary of the Atlantic Richfield Company.

[2] ARCO will not be permitted to raise its power to offset the reduction in antenna gain.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Air Space Radio Systems, Licensee of Multiple Address System stations WNER 729, WNEU 324 and WNEU 323 in the Part 94 Private Operational-Fixed Microwave Radio Service

File No. MW-2704

ORDER

Adopted: November 21, 1988; Released: December 6, 1988

By the Chief, Private Radio Bureau:

1. By this action the Chief of the Private Radio Bureau, on his own motion, grants a waiver of the Power Radio Service eligibility provisions of Section 90.63 of the Commission's Rules, 47 C.F.R. § 90.63, to Air Space Radio Systems (ASR).

2. The Commission has authorized the above-captioned stations frequency pairs at Stuart, Boca Raton and Miami, Florida, as part of a statewide multiple address system (MAS) network to service Part 94 eligibles. Unanticipated harmful interference, however, from existing co-channel stations prevents use of the frequencies by ASR.

3. The frequency pairs assigned to the captioned stations are integral links in ASR's data network. Moreover, ASR made commitments to financial institutions for the transmission of high-speed financial transaction data based on availability of these frequencies. Under these circumstances, grant of a waiver to allow ASR to operate on unused alternative frequencies to remedy the interference problem is in the public interest.[1]

4. Accordingly, pursuant to Section 0.331 of the Commission's Rules, 47 C.F.R. § 0.331, ASR IS GRANTED a waiver of Section 90.63 of the Commission's Rules, 47 C.F.R. § 90.63, to permit operation on the frequencies 952.4375/928.4375 MHz (WNEU-323, Miami) and 952.7375/928.7375 MHz (WNEU-324, Boca Raton; WNER-729, Stuart) in the Power Radio Service. This waiver is conditioned upon ASR submitting its authorizations for the existing frequencies for cancellation.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

FOOTNOTE

[1] *See WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969); *Capitol Broadcasting Corporation*, 46 FCC 2d 313, 319 (1973). *See also* Section 90.151 of the Commission's Rules, 47 C.F.R. § 90.151.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BellSouth Corporation's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs — AAD 7-1677

MEMORANDUM OPINION AND ORDER

Adopted: November 25, 1988; Released: December 7, 1988

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In the *Joint Cost Order*,[1] the Commission required certain subject carriers, including the telephone companies owned by BellSouth Corporation, to file manuals for separating the costs of regulated telecommunications services from the costs of nonregulated activities. In response to this requirement, BellSouth filed a cost allocation manual on August 12, 1987. That manual described BellSouth's nonregulated activities, listed the activities BellSouth proposed to treat as incidental activities, and provided information on BellSouth's affiliate transactions, employee time reporting procedures, and cost apportionment methods.

2. We reviewed that manual in the *BellSouth Order* [2] and found that certain areas of the manual required clarification or revision. Despite these problem areas, we conditionally approved BellSouth's manual. We determined that the manual provided adequate assurances against the misallocation of costs and revenues between regulated and nonregulated activities to permit its implementation on January 1, 1988. We required, however, that BellSouth submit revisions addressing each of the specified problem areas. We stated that these revisions would be subject to public comment and our review, and that we would take all appropriate action, including the prescription of specific apportionment procedures, in the event we disapproved any part of the revised manual. [3]

3. BellSouth submitted its revisions on March 14, 1988, and further revised its manual on August 1, 1988. The March 14 revisions provide additional information regarding the problem areas identified in the *BellSouth Order* and, according to BellSouth, comply fully with that Order.[4] MCI Telecommunications Corporation (MCI) filed comments on the March 14 revisions and BellSouth has replied. The August 1 revisions propose changes to certain cost pools and apportionment methods, and add additional nonregulated activities and affiliate transactions. No party commented on these revisions.[5]

4. After reviewing the pleadings and the contents of BellSouth's revisions, we find, subject to certain exceptions, that they are consistent with the Commission's requirements for cost allocation and properly implement the *BellSouth Order*. Before turning to these exceptions, we wish to emphasize that this Order does not discuss the many areas that no party has asked us to address in which BellSouth has complied fully with Commission requirements and with the *BellSouth Order*. We also wish to emphasize that the exceptions are very limited in relation to the manual as a whole. Accordingly, we approve BellSouth's March 14 and August 1, 1988 revisions, subject to the filing of additional information and revisions specified herein. This filing shall be made no later than January 31, 1989.[6]

5. In the *BellSouth Order*, we stated that BellSouth would be required to make all revisions we approved or ordered effective as of January 1, 1988.[7] We recognize that such retroactivity may not be reasonably practicable with regard to certain additional changes we require in this Order. We direct BellSouth to make such changes effective January 1, 1988 to the extent possible, and to identify in the transmittal to its filing which changes, if any, it cannot reasonably implement as of January 1, 1988, and the justification for not implementing changes retroactively.[8]

II. DISCUSSION

A. *Overall Sufficiency of the Revised Manual*

6. Under the *Joint Cost Order*, each cost allocation manual must describe the nonregulated activities, incidental activities, affiliate transactions, employee time reporting procedures, and cost apportionment methods of the telephone operating companies that will apply it. In the *BellSouth Order*, we required BellSouth to provide additional, and in certain instances, corrected information regarding most of these areas. We were particularly concerned with the methods BellSouth proposed for assigning costs to cost pools and for apportioning cost pools between regulated and nonregulated activities. We found those methods important because the costing system established in the *Joint Cost Order* requires telephone companies to divide the accounts and subaccounts listed in the Commission's Uniform System of Accounts (USOA) into homogeneous cost categories or pools that can be directly assigned to, directly or indirectly attributed to, or allocated between regulated and nonregulated activities on a cost-causative basis.[9]

7. Although we ordered BellSouth to provide additional information regarding its cost pool assignment and apportionment methods, we did not require BellSouth to identify and justify the reporting codes, accounting records, and records of charges to accounts that support those methods. We determined, despite MCI's argument to the contrary, that such information would not be necessary for us to evaluate BellSouth's overall apportionment system.[10]

8. In its revised manual, BellSouth provides extensive additional information regarding its cost pool assignment and apportionment methods. MCI argues that although the information makes the manual more "cosmetically helpful," many of BellSouth's cost pool assignment and apportionment methods remain vague.[11] MCI argues that we must require BellSouth to provide more thorough descriptions of its cost pool assignment and apportionment methods in order to evaluate the manual properly and that we should require that information at this time.

MCI claims that BellSouth's entire costing process continues to rely on the review and analyses of fundamental accounting records and reporting codes that the manual neither fully explains nor justifies. MCI contends that BellSouth should be required to describe these records and codes more precisely, and to justify using them as the basis for apportioning costs between regulated and nonregulated activities.[12] MCI argues further that we should clarify the procedures we intend to employ in auditing and overseeing the cost allocation manual process. In MCI's view, these procedures should make clear that telephone companies must make their fundamental cost data available to their independent auditors and to the Commission, and should specify how the Commission intends to review and test that data. In addition, MCI maintains that we should state the processes we will employ to review independent auditor reports and to obtain any relevant cost data that the independent auditors do not review.[13]

9. In response, BellSouth contends that MCI has not shown that the manual is inconsistent with the *BellSouth Order*. BellSouth asserts that its manual complies fully with that Order and that the function of the manual is not to contain all of the underlying data and supporting records MCI requests since the individual auditors will have access to that information. In BellSouth's view, the additional information MCI seeks would add unnecessary detail to the manual, and would impede its review.[14] Finally, BellSouth maintains that MCI's concerns regarding Commission access to the fundamental cost data underlying the manual are misplaced. BellSouth states that the independent auditor process was examined extensively in the *Joint Cost Order* and the *Reconsideration Order*. In addition, BellSouth states the Accounting and Audits Division has set forth detailed attestation requirements for auditors. Therefore, BellSouth argues, the comment cycle for BellSouth's March 14 revisions is an inappropriate forum for addressing the independent auditor process.[15]

10. We find that BellSouth's revised manual generally complies with the *BellSouth Order*. In that Order, we declined to require BellSouth to identify and justify the reporting codes, accounting records, and records of charges to accounts that support its cost pool assignment and apportionment methods. We found that requiring BellSouth to describe those methods in greater detail would be sufficient to eliminate any ambiguities and deficiencies in the manual.[16]

11. Our review of the manual confirms that it now contains sufficient information for us to evaluate virtually all of BellSouth's cost pool assignment and apportionment methods. We required additional information regarding those methods for two reasons. First, we wanted to ensure that the Commission, BellSouth and the independent auditors would share a common understanding of the BellSouth manual. We are satisfied that the revised manual achieves this purpose. A more detailed manual would not increase our ability or the independent auditors' ability to verify proper implementation of the manual.[17]

12. Our second reason for requiring additional information regarding BellSouth's cost pool assignment and apportionment methods was to enable us to review the substantive merit of those methods that BellSouth had not adequately explained. In virtually all instances, the revised manual contains sufficient information to let us perform this review. As discussed below, we require additional information regarding a limited number of BellSouth's cost pool assignment and apportionment methods. However, that information need not include the reporting codes, accounting records, analytical steps, and other procedures that BellSouth has developed to implement its apportionment methods.[18] Accordingly, we reject MCI's request that we require BellSouth to provide an additional level of detail regarding its overall cost pool assignment and apportionment methods.

13. We agree with MCI, however, that the data gathering procedures and documentation underlying the apportionment procedures set forth in the manuals are critical in any decision as to the reasonableness of the amounts assigned or allocated to nonregulated activities. However, that does not justify inclusion of such material in the manuals to the extent that the resulting documents are so cumbersome as to obscure their primary purpose – the comprehensive description of how the carrier complies with the Commission's cost apportionment policies and rules.[19] It may well be that our audits or our review of the independent auditor reports will reveal problems not with the apportionment procedures themselves, but with the underlying data collection and recording procedures. If this is the case, we will require revisions in the apportionment results and, if necessary, disallow for ratemaking purposes those costs that have been improperly included in the carriers' regulated accounts.

14. We also decline to specify the precise procedures we will employ in auditing and overseeing the cost allocation manual implementation process. While we intend to examine cost allocation and other accounting procedures in the course of our regular carrier audits and our review of independent auditor reports,[20] the procedures we will employ will be tailored to the circumstances we encounter. We emphasize, however, that telephone companies must retain a complete audit trail of all cost allocations and affiliate transactions, and must make that information, as well as the independent audit and all related data and workpapers, available to the Commission.[21] We will, of course, require further changes to the manual in the event our own audits or our review of the independent auditor reports reveal a need for such action.[22]

B. *Time Reporting*

15. *Premises Sales Employees*. In both its initial and revised manuals, BellSouth states that "all premises sales supervision and clerical support costs will be pooled as a common cost and will be apportioned between regulated and nonregulated using the Marketing Allocator."[23] In its initial manual, BellSouth proposed to implement this statement by creating a "Sales Support" cost pool within Account 6612 - Sales, that would be apportioned using the marketing allocator. We required BellSouth to justify this proposed use of the marketing allocator.[24] In response, BellSouth proposed a more cost-causative apportionment method for its sales support costs.[25] BellSouth should also have eliminated the above quoted statement that the marketing allocator will be used to apportion sales supervision and clerical support costs. BellSouth must amend its manual accordingly.

16. *Exception Time Reporting Employees*. In its revised manual, BellSouth states that exception time reporting employees fall into the following three categories: (1) those who normally spend 100 percent of their time on regulated activities; (2) those who normally spend 100 percent of their time on nonregulated activities; and (3) those who normally spend time on both regulated and

nonregulated activities.[26] The manual proposes that Category 1 and 2 employees be assigned reporting codes that identify all of their non-exception time (productive and nonproductive) to either regulated or nonregulated activities. Category 3 employees would be assigned reporting codes which would attribute all of their non-exception productive and nonproductive time between regulated and nonregulated activities in proportion to predetermined percentages.[27] To illustrate how this would be done, BellSouth states:

> [A] product manager who works on product development for both regulated and nonregulated products might be assigned 60% to regulated and 40% to nonregulated. All [non-exception] productive and nonproductive time would be split 60/40 between the two service categories automatically . . . The rationale for the percentages will be documented and retained by the employee's supervisors.[28]

We believe that BellSouth should be able to assign the time of its Category 3 employees to regulated and nonregulated activities based on the actual work done rather than on predetermined percentages.[29] We require BellSouth to amend its manual accordingly. If BellSouth finds it impossible to assign the time of any employee group based on actual work done, it shall amend its manual to state how it calculates the percentages used for that group and the reasons why it believes the percentages will produce an accurate apportionment of employee wages and salaries between regulated and nonregulated activities.

C. *Affiliate Transactions*

17. In its revised manual, BellSouth states that its manual identifies the " *primary* services and supplies" that are provided to or received from each affiliate.[30] This language, which was not included in BellSouth's initial manual, is inconsistent with the Commission's requirement that each cost allocation manual list all affiliate transactions engaged in by the carriers that will apply the manual.[31] Accordingly, we require BellSouth to amend the affiliate transaction of its manual to reflect that *all* affiliate transactions in which its telephone operating companies engage are listed in the manual.

18. *Purchase and Sale of Telecommunications Equipment.* In the *BellSouth Order*, we required that BellSouth provide additional information on the nature, terms and frequency of its affiliate transactions sufficient to let us evaluate whether BellSouth's treatment of these transactions will comply with the Commission's rules.[32] The revised manual lists the purchase and sale to carriers of telecommunications equipment for official use as one of the principal services received from South Central Bell Advanced Systems, Inc. (SCBASI).[33] The manual does not list any asset transfers from this affiliate to carriers. However, telecommunications equipment is an asset whose transfer is subject to the Commission's rules for asset transfers. Since Section 32.27 of the Commission's Rules[34] treats services and asset transfers quite differently, we direct BellSouth to clarify the nature of these telecommunications equipment transactions. If SCBASI is providing carriers with purchasing services for telecommunications equipment the carriers obtain from third parties, BellSouth may continue to list these transactions as a service. If, however, SCBASI is providing the carriers with telecommunications equipment from SCBASI's own inventories of such items, BellSouth must list these transactions as asset transfers and specify terms that comply with the Commission's rules regarding such transfers.[35]

D. *Undefined Terminology*

19. In its initial manual, BellSouth proposed to assign certain costs to cost pools and to apportion certain cost pools in accordance with its "analysis" of the activity within the underlying accounts. Since BellSouth had not described the analyses it would be performing, we required BellSouth to state in its revised manual exactly what it contemplated for each of its analyses.[36] We were particularly concerned with BellSouth's use of the phrase, "analysis of underlying transactions."[37]

20. In its revised manual, BellSouth provides the following definition of "analysis of underlying transaction":

> As used in this CAM, this term means that each transaction in the account is reviewed to determine the nature of the cost, the purpose for which the cost was incurred and the amount to be apportioned to regulated and nonregulated activities. This method will be used on accounts that have a limited number of entries.[38]

We are concerned that this definition does not reveal the criteria BellSouth will employ in apportioning the costs of individual transactions that benefit both regulated and nonregulated activities. BellSouth must further amend its manual to state, for each cost pool that would be apportioned on the basis of BellSouth's "analysis of underlying transactions," whether the transactions to be analyzed benefit both regulated and nonregulated activities and, if so, the criteria to be employed in apportioning the costs of the transactions.

E. *Specific Accounts*

Account 1439 - Deferred Charges

21. In its initial manual, BellSouth failed to propose apportionment methods for this account and for Account 4120 - Other Accrued Liabilities. In the *BellSouth Order*, we required BellSouth to include such apportionment methods in its revised manual.[39] We also ordered BellSouth to create a cost pool for deferred charges related to compensated absences within Account 1439 and a cost pool for liabilities related to compensated absences within Account 4120.[40] In its revised manual, BellSouth lists the required cost pools and states that the cost pool for deferred liabilities related to compensated absences will be apportioned between regulated and nonregulated activities using the distribution of current wages and salaries.[41] While this apportionment factor is acceptable, the revised manual also states that the cost pool for deferred charges related to compensated absences will be directly assigned to regulated activities. We believe that this cost pool should be apportioned between regulated and nonregulated activities using the apportionment factor BellSouth is applying to its cost pool for deferred liabilities related to compensated absences. BellSouth shall amend its manual accordingly.

Account 2123 - Office Equipment

22. In its initial manual, BellSouth proposed to divide this account into cost pools for "Plant" and "Other" office equipment. In its revised manual, BellSouth proposes to create an additional cost pool for "Corporate Communications Equipment," and to directly assign this cost pool to regulated activities.[42] In support of this direct assignment, BellSouth states that "[u]se of network for nonregulated is billed at tariffed rates."[43] Although we agree that investment in network plant should be directly assigned to regulated activities when a carrier's nonregulated activities pay tariffed rates for the use of that plant, BellSouth has not made clear whether its "Corporate Communications Equipment" cost pool is restricted to such plant. BellSouth shall clarify this matter in an amendment to its manual. Any plant in this cost pool that is not provided at tariffed rates shall be assigned to an additional cost pool. This additional cost pool shall be apportioned between regulated and nonregulated activities using total company wages and salaries.[44]

Account 3100 - Accumulated Depreciation and Account 6561 - Depreciation Expense - Telecommunications Plant in Service

23. In its revised manual, BellSouth proposes to create three cost pools within this account. The first cost pool is for equal access and network reconfiguration and would be directly assigned to regulated activities. Although this proposal is acceptable, a problem arises with the second cost pool proposal and its apportionment. BellSouth's second cost pool within this account is for telecommunications plant in service except equal access and network reconfiguration. BellSouth proposes that "each accumulated depreciation account" in this cost pool be apportioned between regulated and nonregulated "in the same proportion as the related Part 32 account," including investment in equal access and network reconfiguration equipment.[45] We believe that the inclusion of equal access and network reconfiguration investment in this apportionment factor, in combination with the direct assignment to regulated activities of the equal access and network reconfiguration cost pools within Account 3100, will result in an overallocation of costs to regulated activities. Accordingly, we require BellSouth to amend its manual to specify that equal access and network reconfiguration costs will be excluded from the calculation of the apportionment factor for its second cost pool within this account.

24. BellSouth's third cost pool within Account 3100 is for reserve imbalances. BellSouth proposes to assign this cost pool, which was not included in the initial manual, directly to regulated activities. Since the plant to which BellSouth's reserve imbalances relate is used to provide both regulated and nonregulated activities, we require that BellSouth apportion its reserve imbalances in the same proportion as the apportionment of that plant. BellSouth shall amend its manual accordingly.

25. In the *BellSouth Order*, we required BellSouth to provide separate cost pools for depreciation expense for each of the major plant accounts and to base the apportionment of each cost pool on the related plant account.[46] The revised manual does not provide a depreciation expense cost pool for each of the major plant accounts. We believe that this omission may have been the result of an inadvertent error on BellSouth's part. Therefore, we require that BellSouth amend its manual to include these cost pools.

Account 5301 - Uncollectible Revenue - Telecommunications, Account 5302 - Uncollectible Revenue - Other, and Account 7991 - Other Nonregulated Revenues

26. In its initial manual, BellSouth presented no apportionment proposals for these accounts. We required that BellSouth include such proposals in its revised manual,[47] and BellSouth now proposes to assign these accounts directly to regulated activities. BellSouth states that it charges all nonregulated revenues and all nonregulated uncollectible revenues directly to Account 7991 - Other Nonregulated Revenues.[48] The revised manual, however, neither lists Account 7991 in the cost table nor explains how BellSouth determines the amount of uncollectible revenue to record in that account.

27. Although BellSouth's revenue accounting procedures appear consistent with the Commission's present accounting rules, the *Further Reconsideration Order* deleted Account 7991 and added Account 5280-Nonregulated Operating Revenue.[49] Those rule changes will become effective on May 22, 1989. BellSouth should revise its manual to list Account 5280 prior to that effective date.[50] In addition, it is essential to our monitoring efforts that the cost manual list any account in which BellSouth records revenues derived from nonregulated activities to which the manual apportions costs.[51] It is also essential that the manual specify the procedures BellSouth employs to divide the uncollectible revenue among its revenue accounts. Therefore, we require that BellSouth specify those criteria in its further revisions. Those criteria shall make clear that BellSouth apportions uncollectible revenue related to telecommunications activities in proportion to relative telecommunications revenue and uncollectible revenue related to non-telecommunications activities in proportion to relative non-telecommunications revenue.[52]

Account 6121 - Land and Building Expense

28. In its revised manual, BellSouth divides this account into "Equal Access" and "Other" cost pools. The "Equal Access" pool is being directly assigned to regulated activities. Although this is appropriate, a problem arises with the apportionment factor BellSouth proposes for the "Other" cost pool, which differs from the factor in the initial manual. BellSouth proposes that this cost pool be apportioned between regulated and nonregulated based on the relative investment value of Account 2121 - Buildings, including investment in equal access buildings.[53] We believe that the inclusion of equal access investment in this apportionment factor, in combination with the direct assignment to regulated activities of the equal access cost pool within Account 6121, will result in an overallocation of costs to regulated activities. Accordingly, we require BellSouth to amend its manual to specify that equal access costs will be excluded from the calculation of the apportionment factor from its "Other" cost pool within this account.

Account 6211 - Analog Electronic Expense

29. In its revised manual, BellSouth proposes to create a cost pool for "Enhanced Services - Repair and Maintenance" within this account. This cost pool, which was not in BellSouth's initial manual, would be apportioned using the "ratio of enhanced services switching investment to total analog switch investment," according to BellSouth's proposals. The Commission has required that

maintenance expenses be apportioned in proportion to current regulated/nonregulated usage.[54] BellSouth's apportionment basis is based upon investment rather than usage. BellSouth is therefore required to amend its manual to propose a measure of current usage to apportion this cost pool.

Account 6212 - Digital Electronic Expense

30. In its revised manual, BellSouth proposes to create a new cost pool in this account for "Packet Switching Trouble Tickets Repair." BellSouth proposes to assign costs to this cost pool "[b]ased on packet switching trouble tickets utilizing ratio of packet switching investment to total digital switch investment."[55] Since BellSouth has not explained this cost pool assignment method, it must do so in its further revisions to its manual.

Account 6535 - Engineering Expense

31. In the *BellSouth Order* we ordered BellSouth to exclude Account 2321 - Customer Premises Wiring from its apportionment factor for the "Engineering General Supervision and Planning - Construction Related" cost pool in this account. We did so since BellSouth no longer provides inside wiring under tariff and the balance of the account is being amortized.[56] In its revised manual, BellSouth states that it has not amended its manual to exclude Account 2321 from this apportionment factor. BellSouth states "[i]f this [the Bureau's] logic applies to Account 2321 it would also apply to any similar accounts."[57] We find BellSouth's statements unconvincing. BellSouth presently incurs no engineering expense in connection with the costs recorded in Account 2321. Therefore, including Account 2321 results in the apportionment factor for this cost pool is improper. BellSouth must therefore amend its manual to eliminate Account 2321 from that apportionment factor.

Account 6611 - Product Management

32. In its initial manual, BellSouth proposed to apportion its "General Support" cost pool within this account using the marketing allocator. In the *BellSouth Order*, we stated that we were not convinced that BellSouth's proposal represented a proper use of the marketing allocator. Since we believed that BellSouth's time reporting procedures might allow BellSouth to differentiate between regulated and nonregulated costs in this cost pool, we required BellSouth either to provide for this differentiation or justify in detail the need to apply the marketing allocator.[58]

33. In its revised manual, BellSouth maintains the marketing allocator and states,

> All costs that can be identified in this manner [i.e., through BellSouth's time reporting procedures] are included in the cost pool labeled product management. The CAM now makes clear that employees report to job function or field reporting codes and not to Part 32 accounts. Based on the description of these codes, costs are assigned directly to regulated and nonregulated activities. The remaining costs are based on the marketing allocator.[59]

34. We are unconvinced by these statements. In the *BellSouth Order*, we requested that BellSouth explain how costs are identified as either management or support.[60] In response, BellSouth's revised manual states that costs in "General Marketing Support" pool include various support functions for product management activities.[61] If, as BellSouth represents, the "Product Management" pool can be apportioned using payroll coding and exception time reporting and if the "General Marketing Support" pool is essentially providing support for the activities in the "Product Management" pool, then it should be apportioned in proportion to the "Product Management" pool. If BellSouth considers this improper, there may be activities in the "General Marketing Support" pool that do not necessarily support the "Product Management" pool and thus do not belong in the support pool. If this is the case, BellSouth should create a third pool labeled "Other" and apply the marketing allocator. BellSouth must clarify these matters in its further revisions to its manual.

Account 6612 - Sales

35. The revised manual includes a new cost pool within this account for "Network" sales expense. BellSouth proposes to base the apportionment for this cost pool on "awards associated with sales time expended."[62] BellSouth has not adequately explained this apportionment factor, and thus must do so in its further revisions to its manual.[63]

Account 6728 - Other General and Administrative

36. BellSouth's revised manual proposes a new cost pool within this account for deferred compensated absences. The manual also proposes to assign this cost pool directly to regulated activities. Consistent with our treatment of BellSouth's cost pool for deferred charges related to compensated absences,[64] we require that BellSouth apportion this deferred compensated absences cost pool between regulated and nonregulated activities using the distribution of current wages and salaries.

Account 7220 - Operating Federal Income Taxes, Account 7230, Operating State and Local Income Taxes, and Account 7250 - Provision for Deferred Operating Income Taxes - Net

37. In its initial manual, BellSouth proposed to allocate current income taxes on the basis of the "separate taxable incomes of the regulated and nonregulated operation" and deferred taxes on a variety of bases, with most pools based on plant assignment.[65] We concluded that applying different apportionment bases to any of these accounts could result in the assignment of costs that is not consistent with related book income.[66] We directed BellSouth to combine these accounts into a single cost pool and allocate the total income tax for the period on the basis of specifically-defined book income. In its revisions, BellSouth has simplified the allocations for Account 7250, but retains a distinction in the cost pools therein between those costs that are "property related" and those that are "nonproperty related." BellSouth allocates operating income taxes based on relative book income. However, BellSouth proposes to compute the ratios for allocating operating income taxes by first subtracting property related costs from the regulated and nonregulated income taxes. [67] BellSouth states in its revision that the Bureau's proposed allocation does not properly assign income taxes in accordance with Internal Revenue Service requirements and could "jeopardize" the accumulated deferred tax balance.[68]

38. BellSouth's revisions do not comply strictly with our requirement in the *BellSouth Order* that operating income taxes and deferred operating income taxes be allocated on book income. This procedure appears to be equitable and easy to apply,[69] and BellSouth's concern that the procedure could jeopardize its tax deferrals is not convincing. Upon further review of this area, however, we will not mandate a further modification of BellSouth's procedure for allocating deferred operating taxes in part on investment. BellSouth's allocation of Account 7250 is an improvement on and simplification of its earlier method, and apparently satisfies its concern that its tax deferrals could be jeopardized if a different method is used for that account. However, we adhere to our conclusion in the *BellSouth Order* that use of investment-based allocations for the income tax accounts is not proper. BellSouth's proposal to differentiate between property-related and nonproperty-related costs is not required for a fair allocation of income taxes, and in fact may allocate excessive income taxes to regulated operations. Accordingly, BellSouth must as directed in the *BellSouth Order* allocate its total taxes for the period on the basis of specifically defined book income. Any difference between the total tax allocated based on book income and the deferred taxes in Account 7250 as proposed in the revisions shall be reported in Accounts 7220 and 7230, as appropriate, so that the total of individual Accounts 7220, 7230 and 7250 equals the total tax allocated based on specifically defined book income.

III. ORDERING CLAUSES

39. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), that BellSouth's March 14, 1988 and August 1, 1988 revisions to its Cost Allocation Manual ARE APPROVED, subject to the conditions stated in this Order.

40. IT IS FURTHER ORDERED, that the revisions required herein shall be filed no later than **January 31, 1989.**

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, *Report and Order*, CC Docket 86-111, 2 FCC Rcd 1298 (1987) (*Joint Cost Order*), *recon.*, 2 FCC Rcd 6283 (1987) (*Reconsideration Order*), *further recon.*, FCC 88-355 (released November 18, 1988) (*Further Reconsideration Order*), *petitions for review pending*, Southwestern Bell Tel. Corp. v. FCC, D.C. Circuit No. 87-1764 (filed December 14, 1987); National Tel. Cooperative Association v. FCC, D.C. Circuit No. 87-1771 (filed December 15, 1987).

[2] BellSouth Corporation's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 128 (1988)(*BellSouth Order*).

[3] *Id.* at 128, para. 2; *id.* at 138, para. 96.

[4] BellSouth Reply at 2.

[5] BellSouth also filed revisions on September 30, 1988, and on October 31, 1988. These additional revisions are the subject of separate public notices and are not addressed in this Order. *See* Public Notice, BellSouth Files Revisions to Cost Manual, DA 88-1761 (released November 16, 1988); Public Notice, Ameritech, Bell Atlantic, BellSouth, Pacific Bell, Nevada Bell, NYNEX, U S West, and Southwestern Bell File Revisions to Cost Manuals, DA 88-1663 (released October 26, 1988).

[6] BellSouth may defer its December 31, 1988 quarterly update, if any, until this date.

[7] *BellSouth Order*, 3 FCC Rcd at 128, para. 2.

[8] With regard to those revisions that BellSouth claims it cannot make retroactively, we reserve the right to require either retroactivity or subsequent adjustments to reflect the impact of the lack of retroactivity on 1988 operations.

[9] *BellSouth Order*, 3 FCC Rcd at 129, para. 9; *see also Joint Cost Order*, 2 FCC Rcd at 1317-19, paras. 147-64.

[10] *BellSouth Order*, 3 FCC Rcd at 129, paras. 6-9.

[11] MCI Comments at 3-5.

[12] *Id.* at 5.

[13] *Id.* at 5-8.

[14] BellSouth Reply at 1-4.

[15] *Id.* at 4.

[16] *BellSouth Order*, 3 FCC Rcd at 129, paras. 6-9.

[17] *See Reconsideration Order*, 2 FCC Rcd at 6305, para. 191.

[18] *See Joint Cost Order*, 2 FCC Rcd at 1355, n.390; *accord Reconsideration Order*, 2 FCC Rcd at 6305, para. 191.

[19] *Cf. Joint Cost Order*, 2 FCC Rcd at 1355, n.390 (level of detail is comparable to that in Separations Manual, not that in the former Division of Revenues procedures).

[20] *See id.* at 1333, para. 274.

[21] *Id.* at 1329, para. 242; *id.* at 1334, para. 283.

[22] *See id.* at 1333, para. 274.

[23] BellSouth Revised Manual at p. 7-5; BellSouth Initial Manual at 95.

[24] *BellSouth Order*, 3 FCC Rcd at 137, para. 81.

[25] BellSouth Revised Manual at Table 9-1.

[26] *Id.* at p. 7-5.

[27] *Id.* at pp. 7-5 to 7-6.

[28] *Id.* at p. 7-6.

[29] This defect was inadvertently omitted from the *BellSouth Order*.

[30] BellSouth Revised Manual at p. 6-3 (emphasis added).

[31] *See* Nevada Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs and Pacific Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 287, 289, para. 13 (1988)(*Nevada and Pacific Order*); *see also Joint Cost Order*, 2 FCC Rcd at 1328, para. 240.

[32] *BellSouth Order*, 3 FCC Rcd at 130, paras. 13-14.

[33] *BellSouth* Revised Manual at p. 6-9.

[34] 47 C.F.R. §32.27.

[35] In its revised manual, BellSouth's description of services provided to SCBASI appears twice. BellSouth Revised Manual at pp. 6-8 to 6-9 & 6-9 to 6-10. BellSouth should amend its manual to correct this inadvertent error.

[36] *BellSouth Order*, 3 FCC Rcd at 133, paras. 48-49.

[37] *Id.* at 133, para. 48.

[38] *BellSouth* Revised Manual at p. 3-4.

[39] *BellSouth Order*, 3 FCC Rcd at 134, para. 51.

[40] *Id.* at 134, para. 52.

[41] *BellSouth* Revised Manual at Tables 1-3, 5-1.

[42] *Id.* at Table 1-9.

[43] *Id.*

[44] *See* U S West's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 195, 201, para. 57 (U S West Order).

[45] BellSouth Revised Manual at Table 4-1. We inadvertently overlooked the problem created by these allocation procedures in the B ellSouth Order.

[46] *BellSouth Order*, 3 FCC Rcd at 136, para. 77.

[47] *Id.* at 134, para. 50.

[48] BellSouth Revised Manual at Table 6-6.

[49] Further Reconsideration Order, slip. op. at 12, para. 12.

[50] *Id.* at 9, n.10.

[51] *Id.*

[52] *See* U S West Order, 3 FCC Rcd at 206, para. 104.

[53] *Id.* at Table 7-2. We inadvertently overlooked this deficiency in the BellSouth Order.

[54] Joint Cost Order, 2 FCC Rcd at 1320, para. 173.

[55] BellSouth Revised Manual at Table 7-4.

[56] *BellSouth Order*, 3 FCC Rcd at 136, para. 76

[57] BellSouth Revised Manual "Explanations and Justifications" at 16.

[58] *BellSouth Order*, 3 FCC Rcd at 137, para. 79.

[59] BellSouth Revised Manual "Explanations and Justifications" at 18.

[60] *BellSouth Order*, 3 FCC Rcd at 137, para. 78.

[61] BellSouth Revised Manual "Explanations and Justifications" at 17.

[62] *Id.* at Table 9-1.

[63] BellSouth must also clarify that the "Premises" cost pool within this account is being apportioned based on "positive time reporting" as stated in its cost table rather than based on "productive time reporting" as indicated in the "Explanations and Justifications" section of the manual. *See* BellSouth Revised Manual "Explanations and Justifications" at 18.

[64] *See* para. 21, *supra*.

[65] *See BellSouth Order*, 2 FCC Rcd at 138, para. 90.

[66] *Id.* at 138, para. 91. Paragraph 91 of the *BellSouth Order* contains an error. The word "consistent" in the first sentence should be "inconsistent."

[67] BellSouth Revised Manual at Table 11-2.

[68] *Id.* "Explanations and Justifications" at 26.

[69] *See, e.g.*, NYNEX Cost Allocation Manual at 146, approved NYNEX Telephone Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 5978 (1988)

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BellSouth Corporation AAD 5-1230
on Behalf of
Southern Bell
Telephone and
Telegraph Company

Petition for Waiver of Section
64.702 of the Commission's Rules
and Regulations To Authorize
Protocol Conversion Offerings

MEMORANDUM OPINION AND ORDER

Adopted: October 14, 1988; Released: December 6, 1988

By the Commission: Commissioner Dennis dissenting and issuing a separate statement.

I. INTRODUCTION

1. Tymnet, Inc. (Tymnet) and Telenet Communications Corporation (Telenet) have filed applications for review of an Order of the Common Carrier Bureau in the captioned proceeding.[1] *BellSouth Corporation*, Mimeo No. 3489, released Apr. 1, 1986 (*BellSouth Compliance Order*). In the *BellSouth Compliance Order* the Bureau concluded that BellSouth had demonstrated that it had complied with conditions imposed by this Commission relating to the Bell Operating Companies' (BOC) offerings of packet switching services.[2] *BellSouth Compliance Order* at paras. 55-59. In addition, the Bureau concluded that BellSouth's Accounting Plan adequately identified all costs and revenues associated with packet switching and allowed for auditing of costs and revenues. *Id.* at paras. 50-53. The applications for review do not dispute these conclusions. Rather, Tymnet and Telenet argue that the Bureau erred in waiving Section 61.74 of the Commission's Rules, 47 C.F.R. § 61.74, [3] thus allowing BellSouth to reference rates for its intrastate packet switching services in its interstate tariff. For the reasons stated below, we grant the applications for review and clarify the Bureau's actions.

II. PLEADINGS

2. Tymnet notes that this Commission clearly has jurisdiction over BellSouth's packet switching service and argues that the public interest demands that this Commission exercise its jurisdiction to the fullest extent. Tymnet Application at 6-9. Tymnet asserts that BellSouth's compliance with the *Protocol Waiver Order* cannot be monitored unless this Commission analyzes BellSouth's rates and finds them to be justified. Tymnet describes the Bureau's action as an unprecedented delegation of authority to the states. It contends such a delegation will undermine the policy objectives of the Second and Third Computer Inquiries[4] and of the Competitive Carrier Rule Making.[5] *Id.* at 13-22. Finally, Tymnet asserts that the Bureau's action unreasonably deprives Tymnet and other interested parties of important procedural rights because such persons will not be able to seek Commission review of the lawfulness of BellSouth's proposed rates. Tymnet concludes that BellSouth should be directed to file a fully supported federal tariff for its interstate PPSN offerings and that the Bureau should be directed to review the reasonableness of the rates. *Id.* at 22-24.

3. Telenet's arguments are substantially the same as Tymnet's. Telenet adds that it believes that the fundamental error underlying the *BellSouth Compliance Order* was the Bureau's grant of BellSouth's "belated *ex parte* request for waiver of § 61.74" of this Commission's Rules. Telenet Application at 19. Telenet also urges this Commission to investigate Southern Bell's rates for Packet Network Usage to resolve issues comparable to those currently under investigation in CC Docket No. 86-43 relating to New Jersey Bell's Public Data Network offering.[6] *Id.* at 21-22.

4. BellSouth disputes the applicants' contention that the Bureau's decision to permit rate referencing delegates this Commission's authority over BellSouth's interstate rates to the states.[7] Rather, BellSouth states, this action only established that the interstate packet switching usage charges will be the same as the intrastate usage charges. BellSouth Opposition at 2-3. Moreover, BellSouth states, the context of footnote 15 of the *BellSouth Compliance Order* demonstrates that the Bureau decided that the cost and demand data underlying BellSouth's tariff did not require further investigation, but the Bureau did not cede jurisdiction to the states. According to BellSouth, the Bureau merely observed that petitioners could pursue their arguments before the relevant state commissions. *Id.* at 5-6.

5. BellSouth also contends that Tymnet and Telenet have failed to demonstrate that cross-referencing was not justified in this case. BellSouth notes that it cannot determine the customer's jurisdictional use of the packet switching service and that any disparity between intrastate and interstate rates would create a strong incentive for tariff shopping. In any event, BellSouth notes that it provided the cost and demand data underlying its Georgia Pulselink tariff and that the Bureau had the opportunity to review these data. BellSouth further notes that, even if Section 61.38 of this Commission's Rules would have required additional data, this does not mean that further investigation would be warranted. *Id.* at 7-8. Finally, BellSouth notes that it is well established that this Commission's cost support rules are intended to aid this Commission's review of tariff filings and do not confer procedural rights on others. *Id.* at 9.[8]

III. DISCUSSION

6. As we noted at the outset, the applications for review do not actually dispute the main conclusion of the Bureau's *BellSouth Compliance Order*, *i.e.*, that BellSouth's filing complied with the conditions imposed by our *Protocol Waiver Order*. Rather, the applicants merely argue that the Bureau improperly granted BellSouth's request for waiver of Section 61.74 of the Rules. We agree that waiver of Section 61.74 is not appropriate in this case. Nevertheless, we reject the applicants' analysis of the Bureau's action and their rationale for seeking reversal of the Bureau's grant of the waiver request.

7. As a threshold matter, we reject the argument that the Bureau's grant of BellSouth's waiver request ceded the jurisdiction of this Commission over BellSouth's interstate packet switching rates to the states. We do not believe that this was either the intent or the effect of the Bureau's Order. Although the Bureau stated that issues regarding the tariff should be addressed before the state commission, parties retain the right to seek this Commission's review of tariffs on file with us. Certainly, then, this Commission retains full jurisdiction under Title II of the Communications Act to review the lawfulness of rates for interstate services. We have some latitude, however, in determining how best to exercise that jurisdiction. It is well established, for example, that this Commission -- or its operating Bureaus on delegated authority -- may, for good cause shown, waive any of our Rules. Specifically, it is beyond serious dispute that the Common Carrier Bureau may waive relevant sections of Part 61 of the Rules. Part 61 is intended to assist the Bureau in reviewing tariff filings; it does not confer procedural rights on private parties, Tymnet's arguments to the contrary notwithstanding.[9]

8. On the facts of this case, however, we do not believe a waiver of Section 61.74 is justified. As a result of the waiver, customers who are considering ordering interstate packet service from BellSouth are not able to determine the rates that will apply by examining the BellSouth tariff on file with this Commission. BellSouth has not presented any reason to require customers ordering service from BellSouth's interstate tariff to consult BellSouth's state tariff in order to learn what the rates for service will be.[10] We therefore direct BellSouth to file its currently-effective rates for packet switching service in its interstate tariff.[11] This requirement will further important administrative goals by permitting us to monitor such rates and any revisions to them, and also will provide the public with a convenient source of rate information.

9. Although we are reversing the Bureau's decision to grant the cross-reference waiver, the unique facts and circumstances of this case lead us to conclude that investigation of BellSouth's rates is not necessary at this time. BellSouth is a new entrant in the packet switching market, which is currently dominated by a relatively small number of well-established service providers.[12] Thus, the characteristics of this market minimize the possibility of anti-competitive or otherwise improper pricing by BellSouth. Accordingly, we conclude that BellSouth's rates do not warrant investigation at this time.

10. Moreover, we believe that, under the circumstances of this case, further cost support data are not necessary. We therefore are not requiring BellSouth to provide additional Section 61.38 data for those rates at this time. Section 61.38 of our Rules normally requires that carriers proposing to offer a new service submit a study projecting costs for a representative 12-month period as well as estimates of the effect of the proposed tariff revisions on the carrier's traffic and revenues. As we have indicated above, such data are used to facilitate the staff's review of tariff filings and to permit the staff to determine whether an investigation is necessary. As such, the decision whether to require the submission of such data is a matter clearly committed to the sound discretion of this Commission.[13] Because we find that existing market conditions make it unlikely that BellSouth could engage in anti-competitive or otherwise improper pricing, we conclude that it is reasonable to waive the requirement that BellSouth submit detailed cost and demand projections for this service at this time.[14] We emphasize that our decision to waive Section 61.38 in this case does not constitute a determination that such data are not useful for evaluating other new service offerings provided by BellSouth or other carriers. Obviously, the decision as to whether to waive this, or any other, section of our Rules must be based on the particular facts and circumstances of a given case. Based on the facts of this case, we waive Section 61.38 of this Commission's Rules, 47 C.F.R. § 61.38, for the purposes of this filing.[15]

IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that the applications for review of the captioned Order filed by Tymnet, Inc. and Telenet Communications Corporation ARE GRANTED to the extent indicated in this Order and otherwise ARE DENIED.

12. IT IS FURTHER ORDERED that BellSouth Corporation SHALL FILE tariff revisions containing rates for packet switching service not later than 10 days after the release date of this Order, to be effective on not less than one day's notice. For purposes of this filing, Special Permission Number 88-498 is assigned and Sections 61.38 and 61.58 of this Commission's Rules, 47 C.F.R. §§ 61.38, 61.58, are waived.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Tymnet, Inc., Application for Review, filed May 2, 1986 (Tymnet Application); Telenet Communications Corporation Application for Review, filed May 1, 1986 (Telenet Application).

[2] Petitions for Waiver of Section 64.702 of the Commission's Rules and Regulations, 100 FCC 2d 1057 (1985) (*Protocol Waiver Order*). BellSouth called its proposed service Public Packet Switch Network Service (PPSN).

[3] Specifically, Tymnet and Telenet are challenging language in the *BellSouth Compliance Order*. In that Order, the Bureau noted that BellSouth had included its Pulselink tariff in its compliance filing. The Bureau further stated that

> [t]his state tariff, applicable in the state of Georgia, contains supporting cost and forecasting data, and commentors have commented upon it. Recently, however, BellSouth requested and received a waiver of [Section] 61.74 of the Commission's Rules so that its interstate tariff may incorporate by reference its state tariff. . . . Since the Commission has granted BellSouth permission to do so, any issues regarding this tariff, including all supporting data, should be addressed in proceedings before the state regulatory commission.

Id. at n.15 (citation omitted).

[4] Second Computer Inquiry, *Final Decision*, 77 FCC 2d 384, *modified on reconsideration*, 84 FCC 2d 50 (1980), *further modified on reconsideration*, 88 FCC 2d 512 (1981), *aff'd sub nom.*

Computer and Communications Indus. Ass'n v. FCC, 693 F. 2d 198 (D.C. Cir. 1982) *cert. denied*, 461 U.S. 938, *aff'd on second further reconsideration*, FCC 84-190, released May 4, 1984; Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 104 FCC 2d 958 (1986), *modified on reconsideration*, 2 FCC Rcd 3035 (1987), *further reconsideration*, FCC 88-9, released Feb. 18, 1988; *Report and Order*, Phase II, 2 FCC Rcd 3072 (1987), *reconsideration*, FCC 88-10, released Feb. 18, 1988.

[5] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket No. 79-252. *Notice of Inquiry and Proposed Rule Making*, 77 FCC 2d 308 (1979); *First Report and Order*, 85 FCC 2d 1 (1980); *Further Notice of Proposed Rule Making*, 84 FCC 2d 445 (1981); *Second Report and Order*, 91 FCC 2d 59 (1982), *recon. denied*, 93 FCC 2d 54 (1983); *Further Notice of Proposed Rule Making*, 47 Fed. Reg. 17308 (1982); *Third Further Notice of Proposed Rule Making*, 48 Fed. Reg. 28292 (1983); *Third Report and Order*, 48 Fed. Reg. 46791 (1983); *Fourth Report and Order*, 95 FCC 2d 554 (1983); *Fourth Further Notice of Proposed Rulemaking*, 49 Fed. Reg. 11856 (1984); *Fifth Report and Order*, 98 FCC 2d 1191 (1984); *Sixth Report and Order*, 99 FCC 2d 1020, (1985); *vacated and remanded, MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985).

[6] *See* New Jersey Bell Telephone Co., CC Docket No. 86-43, Mimeo No. 2381, released Feb. 4, 1986.

[7] BellSouth Opposition to Applications for Review, filed May 16, 1986 (BellSouth Opposition).

[8] On May 16, 1986, the Ameritech Operating Companies (Ameritech) also filed an opposition to the applications for review. Ameritech's arguments are largely the same as BellSouth's, although Ameritech emphasizes that the applications for review actually concern not the BellSouth Compliance Order but the Bureau's earlier decision to permit BellSouth to cross- reference its intrastate rates in its interstate tariff. Ameritech also argues that the Bureau "quite properly refused to consider such matters as the cost and demand estimates underlying the state rates." Ameritech Opposition at 11.

[9] *See* Aeronautical Radio, Inc. v. FCC, 642 F.2d 1221, 1235 (D.C. Cir. 1980); Amendment of Part 61 of the Commission's Rules Relating to Tariffs and Part 1 of the Commission's Rules Relating to Evidence, 40 FCC2d 149, 152-153 (1973).

[10] We emphasize that, as the Bureau noted, BellSouth is required by our Separations Rules, 47 C.F.R. Part 36, to apportion all costs and revenues associated with the regulated portion of packet switching service between the interstate and intrastate jurisdictions. Such apportionments must be made in accordance with the provisions of Part 36. *See BellSouth Compliance Order* at n.25.

[11] Although Southern Bell's tariff is directly at issue in this proceeding, the result herein applies equally to a similar BellSouth filing made on behalf of South Central Bell. *See* BellSouth Tr. No. 89, filed May 26, 1987. That transmittal, like the Southern Bell transmittal, also cross-referenced South Central Bell's intrastate rates and included data concerning South Central Bell's costs and revenues for interstate packet switching service. Transmittal No. 89 became effective as filed on July 10, 1987. Consistent with this Order, we direct BellSouth to file South Central Bell's intrastate rates for packet switching service in its interstate tariff. Additional interstate cost data for South Central Bell are not required. BellSouth may elect to make the filings for Southern Bell and South Central Bell separately or jointly.

[12] Data provided by Bellcore indicates that, in 1985, shortly before BellSouth filed the transmittal at issue here, 88 percent of the packet switching market was controlled by four service providers. Moreover, petitioners Telenet and Tymnet, the two largest service providers, controlled 67 percent of the market by themselves.

[13] *See ARINC v. FCC, supra*, n.9, at 1234.

[14] Because we permit BellSouth to file rates in its interstate tariff that are the same as the rates in its intrastate tariff, we need not address BellSouth's arguments concerning the potential effects of tariff shopping between state and federal jurisdictions. BOC requests for waiver of Section 61.74 are pending in other proceedings. *See, e.g.*, Southwestern Bell Telephone Company Open Network Architecture Plan, CC Docket No. 88-2, Phase I (filed Jan. 25, 1988) at 85-90. Such requests also raise issues similar to those that parties raise in this proceeding. *See, e.g., id.* at 89-90. See also Open Network Architecture Plan of US West, Inc., CC Docket No. 88- 2, Phase I (filed Feb. 1, 1988) at 364-69. Our actions in this Order do not prejudge such pending requests, which apply to a greater variety of tariffed services, offered under widely differing circumstances, than the packet services at issue in this Order. Commenters in the ONA proceeding, CC Docket No. 88-2, have addressed the tariffing and jurisdictional effects of such waiver requests, and we will decide those issues based on the record compiled in that proceeding. As is true any time waiver of our Rules is requested, our decision whether to waive Section 61.74 of our Rules in order to permit cross-referencing of rates or other tariff terms in the context of the ONA plans will depend upon the demonstration of unique facts and circumstances justifying the requested waiver. Our reversal of the Bureau's waiver of Section 61.74 in this case is based on our finding that BellSouth has not shown such circumstances here.

[15] This action does not, of course, constitute a finding that BellSouth's rates are lawful. We merely conclude that we do not need Section 61.38 data to determine whether this particular tariff filing warrants investigation at this time. Interested persons are free to file complaints against the rates pursuant to Sections 208 and 209 of the Act, 47 U.S.C. §§ 208, 209.

SEPARATE STATEMENT OF COMMISSIONER PATRICIA DIAZ DENNIS

In Re: BellSouth Corporation on Behalf of Southern Bell Telephone & Telegraph Company.

I dissent from the majority's waiving Section 61.38 of the Commission's rules so that the BellSouth telephone companies need not provide cost support data for their interstate packet switching tariffs to be filed in the near future.

In the *Protocol Waiver Order*, 100 FCC 2d 1057 (1985), the Commission adopted a number of safeguards to "ensure that the BOCs' competition [in the packet switching/protocol conversion market] will be fair and not at the expense of subscribers to regulated services", 100 FCC 2d at 1089. Some of the safeguards clearly contemplated the filing of cost support data for BOC packet switching/protocol conversion tariffs.

For example, the Commission stated that the Bell Operating Companies should provide to their enhanced services affiliates "connections to the basic service of transporting signals from end-users' premises to the central office, and through any central office circuit switch-

ing that may be involved . . . on a tariffed basis that reflects the cost of such connections", 100 FCC 2d at 1110.

Alternatively, the BOC could file "both sample state and federal tariff provisions that will govern the availability of such connections [by the BOC] and the tariff provisions that will govern comparable connections used by the VANs and enhanced services providers. These filings should be accompanied by information that identifies and justifies any differences between the two sets of rates." *Id.* at 1111.

The purpose of such requirements, as Chairman (then Commissioner) Patrick pointed out in his separate statement in the *Protocol Waiver Order* was twofold: to "insure that the Commission applies the safeguards announced today in such a way as to preclude the BOCs from realizing unfair (i.e., non cost based) price advantages in the packet switching market, while simultaneously insuring that they are allowed to pass to the public any real efficiencies derived from collocation as expeditiously as possible." 100 FCC 2d at 1117.

Without cost support data, how can the Commission determine whether the federal packet switching tariffs that BellSouth will be filing without cost support pursuant to the majority opinion will comply with these safeguards?

Even if the state rates which the federal tariffs now cross-reference may have complied with the Commission's safeguards, absent cost support data we have little certitude that future rate changes will continue to comply, nor will there be any means of evaluating the reasonableness of a challenged tariff filing. Compare *New Jersey Bell Telephone Company*, CC Docket No. 86-43, FCC Mimeo CC 2381, (Common Carrier Bureau 1986), in which the Bureau set New Jersey Bell's packet switching tariffs for investigation because of questions concerning the carrier's cost support data.

The majority states that interested persons are protected because they are free to file complaints against the federal rate under Section 208 of the Communications Act. The Commission interprets Section 208, however, as placing the burden of proving unlawfulness and damages upon the complainant, *see MCI v. AT&T, et al.*, 85 FCC 2d 994 (1981). The Commission previously placed the initial burden of demonstrating that the rates for packet switching services do not include non-regulated costs on the carriers. Without explanation the majority has now shifted the burden onto those who claim that the carrier's rates do not meet the Commission's requirements.[1]

FOOTNOTE FOR STATEMENT

[1] Because BellSouth is a fairly recent entrant in a packet switching market currently dominated by a relatively small number of well-established service providers, some pricing flexibility may be appropriate. Waiving section 61.38, however, makes it difficult to determine how much flexibility the Commission is granting.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-216

In re Applications of

MARLIN BROADCASTING OF CENTRAL FLORIDA, INC.	File No. BPCT-850319KF
Mary L. Demetree, Barbara C. Roper, *et al.* d/b/a ORLANDO TELEVISION PARTNERS	File No. BPCT-850320KK
SUNSHINE TELEVISION 27, INC.	File No. BPCT-850320KN
REECE ASSOCIATES, LIMITED	File No. BPCT-850320KR
MAGIC CITY BROADCASTING, INC.	File No. BPCT-850320KU
ORLANDO 27, INC.	File No. BPCT-850320KX
HIGHLAND COMMUNICATIONS, LTD.	File No. BPCT-850320LA
CENTRAL FLORIDA TELEVISION, LTD.	File No. BPCT-850320LD
FLORIDA TELEVISION COMPANY	File No. BPCT-850320LM

For Construction Permit for a New Television Station
Orlando, Florida

MEMORANDUM OPINION AND ORDER

Adopted: November 22, 1988; Released: December 7, 1988

By the Review Board: MARINO (Chairman), BLUMENTHAL AND ESBENSEN.

1. In an *Initial Decision* (*I. D.*) 3 FCC Rcd 4699 (1988), presiding Administrative Law Judge (ALJ) John M. Frysiak granted the application of Reece Associates, Limited (Reece) for a construction permit for a new television station at Orlando, Florida and denied the remaining eight mutually exclusive applications. Thereafter, pursuant to a request filed jointly by Central Florida Television, Ltd. (Central) and Orlando Television Partners (OTP), two of the unsuccessful applicants in this proceeding, advising the Review Board that they had reached a merger agreement in principle whereby OTP's application would be dismissed, the Board, by letter dated September 22, 1988, suspended the procedural dates for the filing of exceptions pending action on the proposed merger agreement. Now before the Board are the joint petition for approval of settlement agreement and petition for leave to amend filed respectively on September 26 and October 13, 1988 by Central Florida and OTP. Reece filed oppositions to the petitions on October 12 and October 24, 1988. On October 11, 1988, the Mass Media Bureau filed comments in support of the joint petition for approval of settlement agreement. Central filed a motion for leave to file reply, and accompanying reply, on November 15, 1988.

2. The agreement contemplates that OTP will dismiss its application in return for a 50% equity interest as a limited partner in Central Florida. Central Florida's general partner, Marita Valentine Sapp, will continue to hold a 25% ownership interest in the surviving applicant as the sole general partner, and limited partners, Louis De La Parte, Jr. and T. Terrell Sessums, will continue as limited partners, albeit with reduced ownership interests. The dismissal of OTP's application is contingent on the grant of the settlement agreement and petition for leave to amend insofar as the latter petition incorporates the ownership changes. In addition to the proposed ownership changes, the petition for leave to amend seeks to substitute OTP's engineering proposal for the engineering proposal of Central Florida.

3. Reece opposes the settlement agreement and petition for leave to amend on two grounds: (1) petitioners have not filed a copy of the revised partnership agreement reflecting the ownership changes, thus precluding the competing parties from closely scrutinizing the agreement to assure that no comparative advantage will accrue to Central Florida; and (2) petitioners seek to substitute OTP's engineering proposal for that of Central Florida's, which would result in impermissible comparative upgrading insofar as OTP's proposal has a significant numerical coverage advantage over the Central Florida proposal and comparative coverage was one of the decisional factors in the ALJ's comparative analysis. Central states in its reply that it will provide the parties with a copy of the amended partnership agreement as soon as the petition for leave to amend is granted.

4. We will grant both petitions subject to the "condition that no comparative 'upgrading' ensue to the prejudice of the other applicants." *Daytona Broadcasting Co.*, 97 FCC 2d 212, 214-215 (Rev. Bd. 1984), *modified*, 101 FCC 2d 1010 (1985), *modified on recon.*, 103 FCC 2d 931 (1986). As a general proposition, the Commission encourages settlements, cognizant that "settlements often avoid lengthy and expensive hearings, expedite initiation of new service, and generally serve the public interest." *Texas Television, Inc.*, 91 FCC 2d 1047, 1049 (Rev. Bd. 1982). Notwithstanding this general proposition, the Commission has observed, when confronted with a post-hearing merger agreement comparable to the one now before us, that once the attributes of applicants have been "frozen" for purposes of the comparative analysis, it becomes much more difficult to allow a merger which does not terminate

the proceeding and at the same time preserve the Commission's policy against comparative upgrading. *Daytona Broadcasting Co., Inc* 101 FCC 2d 1010, 1012 (Comm. 1985). Thus, the Commission issued an admonition that such mergers will be carefully scrutinized to ensure that applicants not "combine their superior characteristics into a merged entity in the manner of a smorgasbord and thus upgrade the merged entity." 101 FCC 2d at 1012 (citing Review Board decision, 97 FCC 2d at 218 n. 15). [1] Unlike comparative "upgrading," "downgrading" is not similarly treated, since the competing applicants are not prejudiced where an applicant voluntarily diminishes its own comparative posture. Thus, any "downgrading" is factored into the ultimate comparative analysis. *See WTAR Radio - TV Corp.*, 48 FCC 2d 1147 (1974).

5. Applying these principles to the facts in this case, we perceive no insurmountable difficulties in accepting both the ownership and engineering revisions contemplated by the merger agreement and the petition for leave to amend. Turning to the ownership aspect, we note that, according to the *I. D.*, the surviving applicant, Central Florida, was a limited partnership consisting of one general partner and two limited partners, and it was awarded 100% integration credit by the ALJ. *I. D.* paras. 285, 384. No diversification demerit was assessed by the ALJ against the applicant. *Id.*, at 386. The dismissing applicant, in turn, proposes to merge into Central Florida as a limited partner which, on its face, confers no comparative advantage to Central Florida. *See Anax Broadcasting, Inc.*, 87 FCC 2d 483, 488 (1981)(limited partners' "integration or lack of integration . . . inconsequential" because they have no authority to control the licensee). Central Florida's limited partnership agreement has already been litigated at hearing, and any alleged deficiencies in that agreement can be challenged on appeal. Thus, for example, should Central Florida's comparative posture be diminished by virtue of deficiencies in its original or pre-merger partnership agreement, or for other causes, that applicant would not be allowed to "upgrade" via its revised partnership agreement. Conversely, because of the principle of "downgrading," should it develop that Central Florida's revised partnership agreement contains substantial flaws, that applicant's comparative posture potentially could be reduced. We will, therefore, direct Central Florida to file, prior to the submission of exceptions, an amendment to its application containing a copy of the revised agreement, so that the parties will have an opportunity for timely review. With respect to the change in transmitter sites, we perceive no problem in accepting petitioner's amendment for reporting purposes pursuant to Section 1.65 of the Commission's Rules, 47 CFR §1.65; [2] but, again, we will permit no comparative "upgrading." In this regard, petitioner's claim that the engineering change cannot be construed as impermissible "upgrading" under *Daytona Broadcasting Co., Inc., supra*, 97 FCC 2d 212 (Rev. Bd.), is incorrect. That case, unlike the one here, did not confer a "comparative" coverage improvement on the surviving applicant. The Commission's policy is well established that an applicant will not be permitted to upgrade its coverage proposal beyond that originally proposed, even in response to an involuntary act. *See Women's Broadcasting Coalition, Inc.*, 59 RR 2d 730, 732-733 (1986), *aff'd by judgment sub nom. Plantation Broadcasting Corp. v. FCC, 812 F. 2d 1443 (D. C. Cir. 1987). A fortiori*, "upgraded" coverage will not be permitted where, as here, the change is wholly voluntary.

6. ACCORDINGLY, IT IS ORDERED, That Central Florida Television, Ltd. IS DIRECTED to amend its application to include a copy of the revised limited partnership agreement within seven (7) days of the release date of this Order; and that exceptions to the *Initial Decision*, 3 FCC Rcd 4699, ARE DUE thirty (30) days thereafter;

7. IT IS FURTHER ORDERED, That the motion for leave to file reply filed November 15, 1988 by Central Florida Television, Ltd IS GRANTED, and the reply IS ACCEPTED; and

8. IT IS FURTHER ORDERED, That the joint petition for approval of settlement agreement, filed September 26, 1988 by Central Florida Television, Ltd and Orlando Television Partners IS GRANTED and the settlement agreement IS APPROVED; that the petition for leave to amend filed October 13, 1988 by Central Florida Television, Ltd IS GRANTED subject to the condition that no comparative advantage may result, and the amendment IS ACCEPTED; and that the application of Orlando Television Partners (File No. BPCT-850320KK) IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] The Board has explained the rational against upgrading as follows:

> [T]o be blunt, comparative licensing proceedings conducted under the *Policy Statement [on Comparative Broadcast Hearings,* 1 FCC 2d 393 (1965)] are far too exhaustive and expensive to allow an applicant to be drawn deeply into a competition for the license, only to be confronted by a competitor whose comparative position has been improved *post hoc* by decisionally significant changes in its ownership structure or its broadcast proposals. . . . The second vital reason for barring comparative "upgrading" after the expiration of a predetermined date is the pragmatic necessity . . . of the doctrine of administrative finality". If opposing applicants could continually "upgrade" their individual applications even *after* a comparative hearing has commenced (or, as in this case, terminated), there simply could be no consolidated *comparative hearing within the contemplation of Ashbacker [Radio Corp v. FCC,* 326 U.S. 327 (1945)].

97 FCC 2d at 216-217.

[2] Section 1.65 of the Commission's Rules, 47 CFR §1.65, requires an applicant to amend its application within 30 days whenever the information furnished therein is no longer substantially accurate and complete in all significant respects.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-83

In re Applications of

WEBSTER - FULLER COMMUNICATIONS ASSOCIATES	File No. BPH-870312MJ
ANTHONY E. TRIMBLE	File No. BPH-870323MF
PETER ACHILLES BROIKOU	File No. BPH-870313MP

For a Construction Permit for a
New FM Station on Channel 274A
in Webster, New York

MEMORANDUM OPINION AND ORDER

Adopted: November 22, 1988; Released: December 7, 1988

By the Review Board: MARINO (Chairman), BLUMENTHAL, ESBENSEN.

1. The Review Board has under consideration an appeal filed on October 18, 1988 by Anthony E. Trimble (Trimble), one of three mutually exclusive applicants for a construction permit for a new FM broadcast station (Channel 274A) at Webster, New York. Trimble seeks reversal of a ruling by presiding Administrative Law Judge Walter C. Miller (ALJ) dismissing his application, *Memorandum Opinion and Order*, FCC 88M-3328, released October 6, 1988 (*Order*), and seeks approval of the parties' "Joint Request for Approval of Agreement," filed on September 15, 1988. For the reasons set out below, we affirm the ALJ's *Order*, but do not reach the joint settlement request, a matter which is not properly before us at this time.

2. By *Memorandum Opinion and Order*, FCC 88M-2157, released July 11, 1988, the ALJ added four basic qualifications issues against Trimble, including an issue:

> To determine whether Anthony E. Trimble misrepresented to the Commission when he certified in BPH-870313MF that he had obtained reasonable assurance of the availability of his proposed tower site by contacting the owner of the site, and, if so, what effect that misrepresentation has on his basic qualifications to be a Commission licensee.

Id.[1] On August 25, 1988, the other remaining applicants in the proceeding, Peter Achilles Broiku (Broiku) and Webster-Fuller Communications Associates (Webster-Fuller) filed a "Joint Motion to Dismiss" the Trimble application "on the ground that Trimble has been lacking a viable transmitter site from the inception, causing his application to be substantially incomplete and 'patently not in accordance with the FCC rules, regulations, or other requirements' under Section 73.3566(a) of the Commission's rules, and therefore subject to dismissal." Joint Motion at 1. Trimble opposed this motion on September 6, 1988. The ALJ granted the joint dismissal motion, finding that such relief was appropriate regardless of whether the joint motion was viewed as one simply seeking dismissal or, alternatively, as a request for summary decision of the site misrepresentation issue adverse to Trimble. *Order*, at paras. 4-6. In reaching this result, the ALJ found that Trimble does not have, and has never had, a transmitter site and has been fully aware of that fact. *Id.*, paras. 4, 6.[2]

3. It appears from the preceding recitation that there have occurred here certain procedural irregularities which, while not amounting to reversible error in the particular setting of this case, are nevertheless not to be condoned as a general practice in future cases. To begin with, Trimble, the appellant herein, was faced with a hearing issue specified by the presiding judge to determine the *bona fides* of his application certification that he possessed reasonable assurance of a transmitter site. Rather than proceeding in the normal course to hearing on this issue or even formally requesting summary decision under it pursuant to 47 CFR 1.251, the other applicants instead moved the ALJ to dismiss Trimble's application for want of a transmitter site.[3] In granting this motion, and thereby acquiescing in this unorthodox procedure, the ALJ in effect truncated the usual adjudicative process. Nevertheless, in our view, his action did not result in undue prejudice or surprise to Trimble and any mistake by the ALJ was harmless error, in the substantive sense. That is, Trimble expressly argued in his own opposition to the joint motion to dismiss, that his opponents' pleading was, in fact, a thinly disguised motion for summary decision on the false certification issue, and should be considered as such. In his ruling, the ALJ assumed *arguendo* the existence of a site availability issue, that the joint motion should be treated as a summary decision request, and he concluded that because no genuine issue of fact existed, the issue would be decided adversely to Trimble. Although the ALJ had not added a specific site availability issue, his specification of an issue to determine whether Trimble's certification of site availability was a misrepresentation was sufficient to place Trimble on notice of the subject matter of the dismissal motion. This is necessarily so because where a substantial question exists as to the truthfulness of an applicant's site certification, it follows that the underlying availability of that site is also a *prima facie* issue, and we believe that the more orthodox procedure in this case would have been for the presiding judge to specify both issues. *See , e.g., 62 Broadcasting, Inc.*, FCC 88D-19, released July 18, 1988 (ALJ); *Cf. Northampton Media Associates*, 3 FCC Rcd 5164 (Rev. Bd. 1988). (Issues going to false financial certification *and* underlying financial qualifications *both* specified.) That Trimble himself was not misled is clear from his appeal which describes the issue in question here as one to determine "whether Trimble had obtained 'reasonable assurance' of the availability of his proposed tower site." Brief at 2. In sum, despite the aforementioned irregularities, Trimble had adequate notice that the underlying availability of his site was in question and that summary decision against him under that issue was being sought.

See Kuhn v. CAB, 182 F2d 839, 841-842 (D.C. Cir. 1950). Therefore, the operative question remaining before us is whether summary decision is appropriate.

4. In their joint dismissal motion, Broikou and Webster-Fuller alleged that Trimble certified in his application that his proposed site was owned by Nicholas D'Angelo and that D'Angelo had assured Trimble of its availability. Movants alleged, however, based on deposition testimony taken May 26, 1988, that Trimble had not spoken directly to D'Angelo regarding the site, but instead had relied on assurances of Trimble's "consultant", James Wall. Moreover, movants claimed, D'Angelo never gave Wall assurance of the availability of his property or permission to specify it as a tower site, but merely informed Wall that if he wished to use the site for this purpose, he would have to buy it and the price would be approximately 100,000. In support of their motion, movants attached the certification of site availability from Trimble's application, excerpts from Trimble's deposition testimony, and a declaration under penalty of perjury from Nicholas D'Angelo. Joint Motion to Dismiss, Attachments 1-3. In opposition to the joint motion, Trimble argued that the D'Angelo declaration demonstrated that contacts occurred with Mr. Wall, Trimble's consultant, that terms were discussed, and that the adequacy of the agreement and the "closely factual scenario of conflicting testimony" can only be resolved at a full evidentiary hearing.

5. Summary decision may be granted "where there is no genuine issue as to any material fact" for determination at the hearing. 47 CFR 1.251(d). The filing party must support its motion by affidavit or other materials and the opponent must support its position in like manner; neither side may rely on mere allegations or denials. 47 CFR 1.251(a)(1),(b),)c). Here, as noted, Broikou and Webster-Fuller supported their motion principally with the D'Angelo declaration which, in our view, is quite persuasive. After stating that he had "been advised" that Trimble had specified his land to be used as a transmitter site for his proposed FM station, D'Angelo stated that "this land is not now available for use as a transmitter site, and I have absolutely no agreement (formal or informal) with Mr. Trimble or any other person to permit the use of this land for a transmitter site. Present plans for the land are for a residential subdivision and not a radio tower." D'Angelo further stated that he never talked to Trimble prior to the filing of Trimble's application, that the only person he talked to about the land was Wall, and that Wall never identified Trimble as the person he was representing. According to D'Angelo, Wall contacted him "approximately 2 or 3 times," he advised Wall that "if he wanted to use my land he would have to buy it," that the price "we discussed was approximately100,000," that he "could not use my site without a contract," that "nothing ever materialized," and that he never gave Wall or Trimble permission to specify or use the land for a radio tower. By contrast to D'Angelo's specific statements, Trimble's opposition to the motion responded only generally and without affidavit or other support called for by 47 CFR 1.251.

6. In these circumstances, it is plain that summary decision adverse to Trimble on the site issue is warranted. No genuine issue of material fact exists because it is evident that Trimble has never possessed reasonable assurance of a transmitter site. D'Angelo's unequivocal declaration makes it clear that he never agreed to make his land available to Trimble (or Wall), that indeed he never understood Wall to be representing Trimble in the matter prior to the filing of Trimble's application, and that while D'Angelo was willing to consider selling the land to Wall at a specified price, "nothing ever materialized" in this regard, the requisite agreement never developed, and permission to specify the land was not given. These circumstances fall far short of a meeting of the minds resulting in some firm understanding between site owner and broadcast applicant that is minimally required to establish reasonable assurance of a transmitter site's availability. *See Genessee Communications, Inc.*, 3 FCC Rcd 3595 (Rev. Bd. 1988). Despite Trimble's bald claim that the facts are in dispute, in the absence of any affidavits based on personal knowledge or other documentation submitted by Trimble to specifically controvert the unambiguous statements by D'Angelo, we conclude that the ALJ correctly decided this matter without need of an evidentiary hearing, *see Stone v. FCC*, 466 F.2d 316, 323 (D.C. Cir. 1972)(factual and legal inferences may be drawn from undisputed facts), and that his dismissal of Trimble's application was well within the bounds of Commission precedent. *See Shoblom Broadcasting, Inc.*, 95 FCC 2d 444 (Rev. Bd. 1983), *rev. denied*, FCC 84-119, released April 2, 1984, *aff' d mem. sub nom. Royce Intern. Broadcasting Co. v. FCC*, 762 F.2d 138 (D.C. Cir. 1985) (Table), *cert. denied*, 474 U.S. 995 (1985).[4]

7.ACCORDINGLY, IT IS ORDERED, That the appeal of presiding officer's ruling, filed October 18, 1988, by Anthony E. Trimble IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] The other three issues, which are not at issue in the instant appeal, are a financial misrepresentation/lack of candor issue, a financial qualifications issue, and a real-party-in-interest issue.

[2] The ALJ, the next day, dismissed the proposed settlement agreement as moot, *see* FCC 88M-3352, released October 7, 1988.

[3] In making their request, movants did not even rely on any rule specifically governing dismissal, but merely cited 47 CFR 73.3566(a) which deals with the inapposite situation of prehearing non-acceptance for filing of applications found to be patently defective. Other rules, such as 47 CFR 73.3568(b), 47 CFR 1.276(f), and 47 CFR 1.263(c) all provide specific authority for the dismissal of applications with prejudice where there is a failure to prosecute after an issue is designated for hearing. No such failure to prosecute was either alleged or demonstrated here, however.

[4] In light of our affirmance of Trimble's dismissal, we do not reach Trimble's further request that we act on the merits of the settlement agreement reached by the parties. As noted earlier, the joint request for approval of settlement was denied by the judge in a separate order and, to date, no authorized appeal of that ruling has been filed with us.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN SATELLITE COMPANY — File No. 1480-DSS-ML-88

Application for Modification of License of the ASC-2 Satellite

ORDER

Adopted: November 17, 1988; Released: December 7, 1988

By the Commission:

1. American Satellite Company (Contel ASC) has applied to modify the license for its ASC-2 satellite so that it can be operated from 99^0 West Longitude (W.L.). For the reasons discussed below, we deny Contel ASC's request.

BACKGROUND

2. Contel ASC was granted an authorization and license for its ASC-2 satellite in 1983.[1] This satellite is a hybrid facility designed to operate in both the 4/6 and 12/14 GHz frequency bands. It has been constructed and is in storage awaiting launch in 1991. ASC-2 is currently assigned to 83^0 W.L.[2]

3. Contel ASC owns nine of the twenty-four 4/6 GHz transponders on the Westar IV satellite currently located at 99^0 W.L. Westar IV was authorized in 1981, [3] was launched in 1983 to operate in the 4/6 GHz bands and is owned and operated by Western Union Corporation (Western Union). Westar IV will be at the end of its service life in late 1991 or early 1992.[4] Contel ASC requests that the Commission reassign its ASC-2 satellite to 99^0 W.L. so that it can continue providing service to its customers who are currently using Contel ASC's transponders on Westar IV.[5]

4. After Contel ASC's request was filed, Western Union filed an application for authorization to assign its Westar satellite licenses to Hughes Communications Galaxy, Inc. (Hughes). This application was recently granted.[6] Western Union also filed an application to construct, launch and operate a satellite as a replacement for Westar IV as an "accommodation" to Hughes. Western Union has requested that Westar IV's replacement be located at 99^0 W.L.

5. Western Union and Hughes filed petitions to deny Contel ASC's application, asserting that the proposed Westar IV-R satellite should replace Westar IV at 99^0 W.L. GTE Spacenet Corporation (GTE) submitted a letter opposing assignment of 99^0 W.L. to Contel ASC because GTE had requested that location for its 12/14 GHz satellite, GSTAR 4, in the current domestic fixed-satellite processing group. Two customers of Contel ASC, the New York Stock Exchange (NYSE) and Knight Ridder Commodity News Services, Inc. (Knight Ridder), supported the modification request. National Public Radio (NPR) and Public Broadcasting Systems (PBS) also filed comments.

6. For the reasons discussed below, we deny Contel ASC's request. By separate order adopted today, we grant the Western Union/Hughes application to replace Westar IV at 99^0 W.L. and allow Hughes to assume responsibility to construct, launch and operate that satellite upon consummation of the Western Union/Hughes assignment.[7]

Positions of the Parties

7. Contel ASC asserts that grant of its application is necessary to ensure continuity of service to its customers. These customers include news services, financial services, insurance services, utility services, information services and various other entities including the U.S. Air Force. Contel ASC states that its customers have a total of 21,050 antennas pointed at Westar IV. According to Contel ASC, most of these antennas are very small aperture terminals (VSATs) that would require manual repointing if they were to be used in conjunction with another satellite at a different orbit location. Contel ASC estimates that the overall cost to repoint these antenna networks would be approximately 10,217,000.00 and that repointing would take at least one year during which these networks would be partially or fully inoperative.[8]

8. Contel ASC asserts that it is the only entity that can launch a satellite into the 99^0 W.L. location by Westar IV's anticipated retirement date and provide continuity of service to its customers.[9] Contel ASC also states that it should be assigned to 99^0 W.L. in light of the enormous investment it has made in earth station equipment compatible with that location. With respect to the needs of other Western Union customers currently using Westar IV, Contel ASC states that PBS, which owns four transponders, is considering moving to another satellite. Four other transponders are being used for occasional video service, primarily by transportable earth stations whose operators are, according to Contel ASC, more concerned with price than with orbital location. No other users have expressed a need to stay at 99^0 W.L.

9. Western Union and Hughes oppose Contel ASC's request. They note that contrary to Contel ASC's assertions, Western Union intends to file a replacement application for Westar IV, that the replacement will be fully constructed before Westar IV's retirement,[10] and that Hughes will continue to provide high quality service to all of Westar IV's customers if it assumes Western Union's authorizations. They also state that allowing ASC-2 to locate at 99^0 W.L. would permit Contel ASC to gain an undeserved windfall by allowing it to usurp Western Union's business on the other transponders Contel ASC does not own.[11] Hughes argues that as a "mere user" of the satellite, Contel ASC has no right to preserve continuity of service and any replacement expectancy should be accorded to the satellite licensee. Hughes cites the large amount of capital invested by Western Union in constructing and launching the satellite as well as Western Union's development of a customer base as justification for a replacement expectancy. It argues that grant would be a precedent to claims by dozens of transponder owners on many satellites for specific orbital positions. Hughes also questions the technical capability of ASC-2, which has only eighteen transponders, to accommodate all of Westar IV's present traffic currently being carried on twenty-four transponders. It asserts that the video capabil-

ity on ASC-2 would be of lesser quality than that provided by Westar IV or its proposed replacement Westar IV-R.[12] Finally, Hughes states that grant would allow Contel ASC to bootstrap ASC-2 to a better 12/14 GHz location by circumventing normal processing procedures.

10. NPR and PBS[13] took no position on Contel ASC's application but made suggestions regarding the manner in which the Commission should make its decision. NPR requested that the Commission act on this matter when it assigns all the orbital locations between 99^0 and 139^0 W.L., that it act no later than the end of 1988, and that it take measures to ensure diversity of satellite ownership. PBS requested that the Commission act on this modification as part of a comprehensive plan, that it submit a tentative orbital assignment plan for public comment, and that the Commission make known the procedures and time frame for decisions on its orbital plan.[14]

DISCUSSION

11. In this proceeding, we have been asked to determine whether Contel ASC should be granted authorization to locate its satellite at 99^0 W.L. or whether Western Union/Hughes should be permitted to operate a replacement satellite at that location when Westar IV is retired in late 1991. Though we have consistently emphasized that all orbital assignments are temporary and confer no permanent rights of use to the assignee,[15] we have recognized that:

> [I]n the capital intensive domestic satellite industry there should be some assurance that operators will be able to continue to serve their customers. To do otherwise would chill investment and would impose large costs on satellite users.[16]

We have therefore routinely granted uncontested applications for replacement satellites at the same location at which the satellite to be retired is operating if that location remains available for assignment to a U.S. domestic fixed-satellite and the licensee remains qualified.[17]

12. Based on the record, as set forth in our companion order, we find that Western Union/Hughes should be permitted to launch its replacement satellite at the same orbital location as its existing satellite. Accordingly, we are granting Western Union/Hughes authority to construct and launch a replacement for the Westar IV satellite, which Western Union launched in 1982.[18] Western Union, as the licensee of Westar IV, has expended millions of dollars in constructing and operating the satellite, and has borne the risks associated with the satellite's operation. It has marketed the satellite's capacity and has developed a customer base. Westar IV is currently providing a wide range of satellite-delivered services to users.

13. Although it may be necessary to modify orbital assignments to ensure the flexible application of our policies including, among other things, those to accommodate new entrants, to provide for the changing requirements of existing carriers, and to permit implementation of satellites proposed by other countries,[19] the Commission has emphasized that, in the satellite market, predictability and stability are desirable if such investments are to be encouraged.[20] Adoption of a Commission policy that would permit satellite customers to require licensees to move from their existing orbital positions, as requested by Contel ASC, could add to investor risks and discourage investment. Accordingly, we do not believe the public interest generally would be served by policies that increase the margin of investor uncertainty.

14. We recognize that Contel ASC has a considerable investment in the satellite services provided from 99^0 W.L. because it owns nine of the twenty-four transponders on Westar IV and has developed a customer base in reliance on that location. Nevertheless, we also note that there were means available to Contel ASC through which it might have achieved greater protection for its investment, but that it failed to use. Through a private agreement with the satellite licensee, for example, Contel ASC could have contracted for future transponders in the event the Commission authorized a replacement for Western Union for the same location and frequency band. In these circumstances, we believe that Contel ASC has not provided sufficiently compelling public interest grounds to justify moving Western Union/Hughes from its existing location. Moreover, we note that adoption of the policy urged by Contel ASC could possibly discourage transponder sales. If licensees decline to sell transponders, customers like Contel ASC would in turn be deprived of a valuable mechanism to assure the availability of satellite capacity.[21] In short, grant of Contel ASC's request would not serve the interests of satellite licensees, their customers, or the public.

15. Accordingly, for the reasons set forth above, we conclude that the public interest does not justify grant of Contel ASC's request.

ORDERING CLAUSES

16. Accordingly, IT IS ORDERED that the request of Contel ASC to modify the license for its ASC-2 satellite so that it can be operated from 99^0 W.L. IS DENIED.

17. IT IS FURTHER ORDERED that the Petitions to Deny filed by Western Union Corporation and Hughes Communications Galaxy, Inc. ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] American Satellite Company, 94 FCC 2d 39 (1983).

[2] *See 1985 Orbital Assignment Order*, 50 Fed. Reg. 3528 (August 30, 1985).

[3] Western Union Telegraph Company, 86 FCC 2d 196 (1981).

[4] Pleadings filed by all the parties assume that Westar IV will reach the end of its service life at this time.

[5] Comsat General Corporation has authority to operate its satellites, SBS 1 and SBS 2, in the 12/14 GHz bands at 99^0 W.L. temporarily until that location is reassigned and is ready to be occupied by another satellite. Comsat General Corporation, 3 FCC Rcd 4071 (1988).

[6] Western Union Corporation and Hughes Communications Galaxy, Inc., Application for Consent to Assignment of Licenses, DA 88-1802 (adopted November 16, 1988).

[7] Hughes Communications Galaxy, Inc., FCC 88-379 (adopted November 17, 1988).

[8] Knight Ridder, which provides information on commodities trading, stated that it would have to repoint its over 4000 antennas or find an alternative delivery system if Contel ASC's application is denied. The NYSE stated that 755 subscriber locations would be affected and, in addition to operational difficulties and costs, transition to a satellite located in a different orbital position would require interruption in service or temporary installation of alternative facilities.

[9] Contel ASC bases this assertion on a review of the pending space station applications and concludes that none of the satellites with 4/6 GHz capability will be launched before mid-1992 or 1993. At the time Contel ASC's original application was filed, Western Union had not yet requested authorization for a replacement for Westar IV.

[10] Western Union filed this application on June 15, 1988 and it is granted today in a separate order. *See* note 7, *supra*. Hughes states that, in addition to Westar IV-R, Westar VI-S could be used as a temporary replacement for Westar IV, if necessary. Contel ASC questions this assertion, noting that Westar VI-S is needed to replace Westar III at 91^0 W.L.

[11] Western Union cites Puerto Rico Telephone Co., 92 FCC 2d 1444, 1453 (1983), *rev'd on other grounds sub nom.* All American Cable and Radio Inc. v. FCC, 736 F.2d 752 (D.C. Cir. 1984), for the proposition that the Commission has never required a carrier to surrender its business to another entity.

[12] In response, Contel ASC states that although ASC-2 has only 18 transponders, six of them are 72 MHz wide and that the satellite fully complies with the Commission's technical requirements.

[13] PBS owns four transponders on Westar IV.

[14] As proposed by NPR and PBS, we consider Contel ASC's request for modification in the context of a comprehensive orbit assignment order adopted today. *See* Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, FCC 88-373 (adopted November 17, 1988) (*1988 Orbital Assignment Order*).

[15] *See, e.g.* Licensing of Space Stations in the Domestic Fixed-Satellite Service, 50 Fed. Reg. 36071 (September 5, 1985), at para. 27 (*1985 Report and Order);* Licensing of Space Stations in the Domestic Fixed-Satellite Service, 54 Rad. Reg. 2d (P&F) 577 (1983) (*Reduced Orbital Spacing*), at para. 84; Orbit Deployment Plan-Domestic Satellite, 84 FCC 2d 584 (1981), at para. 46. *See also* Resolution 2 to the International Telecommunication Union (ITU) Radio Regulations.

[16] *1985 Report and Order, id.*

[17] *See, e.g., Satellite Business Systems, 103 FCC 2d 856 (1985); Comsat General Corp., 84 FCC 2d 547 (1981); RCA American Communications, Inc., 84 FCC 2d 633 (1981); Western Union Telegraph Co., 86 FCC 2d 196 (1981). See also* 47 C.F.R. § 25.391, specifying qualification requirements for licensees in the domestic fixed-satellite service.

[18] Despite contrary assertions by both Contel ASC and Hughes/Western Union, either ASC-2 or Westar IV-R can be available for launch in relatively the same time frame and in time to replace Westar IV. Although ASC-2 is already constructed and in storage, Contel ASC has not alleged that it has a definite launch reservation that would enable it to be launched before Westar IV-R can be completed and launched. In any event, Westar IV will not need to be replaced until late 1991 when both ASC-2 and Westar IV-R will be constructed and ready for launch.

[19] *See 1980 Processing Order,* 84 FCC 2d 584, 588 (1981).

[20] *See, e.g., id.* at 601; *1985 Orbital Assignment Order, supra* note 2, at para. 3.

[21] *See* Domestic Fixed-Satellite Transponder Sales, 90 FCC 2d 1238, 1252 (1982), *aff'd sub.nom,* Wold Communications, Inc. v. FCC, 735 F. 2d 1564 (D.C. Cir. 1984).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service

MEMORANDUM OPINION AND ORDER

Adopted: November 17, 1988; Released: December 7, 1988

By the Commission:

I. SUMMARY

1. By separate orders adopted today,[1] we authorize the construction of thirteen additional domestic fixed-satellites and the launch of nine.[2] In addition, we authorize the construction and launch of ten replacement satellites. These newly authorized in-orbit satellites will provide domestic satellite capacity through the 1990's and will offer users a wide range of services. In this order, we assign an orbital location to each domestic satellite authorized to be launched and make certain adjustments, described in detail below, to our current orbital assignment plan.

II. BACKGROUND

2. It has been more than a decade and a half since we established our basic domestic fixed-satellite licensing policies. [3] These policies were designed to permit qualified entities proposing a variety of satellite systems and services to serve the public. They have proven to be flexible enough to allow satellite operators to respond promptly to changing technological, market, and regulatory conditions.[4] In particular, our domestic satellite policies have enabled us to grant authorizations to every qualified applicant without holding comparative hearings, allowing the public to be provided with a wide range of satellite-delivered services in a timely manner. Since *Domsat I*, we have granted four groups of domestic fixed-satellite authorizations – in 1973,[5] 1980,[6] 1983,[7] and 1985.[8] In response to our Public Notice inviting applications to be considered in the fifth domestic fixed-satellite processing group,[9] seven entities filed 19 applications for new or replacement satellites.[10] In addition, three applicants subsequently filed applications for a total of eight replacement satellites.[11] In acting upon this group today, we continue to pursue our long-standing objective as described in *Domsat I* [12] of allowing all qualified applicants, when possible, an opportunity to provide domestic satellite communications services. We grant all applications filed by domestic fixed-satellite applicants that may be acted upon today and assign each space station to an orbital location as specified in the attached *1988 Orbital Assignment Plan*.

3. Our previous orbital assignment orders have summarized the policies and procedures we apply in assigning specific orbital locations to domestic satellites.[13] We have consistently held that applicants' requests for particular orbital locations do not limit our flexibility to assign orbital locations that best serve the public interest. Variations in the characteristics of different orbital locations in the same portion of the geostationary orbital arc are not significant for assignment purposes, nor do requests by different applicants for the same orbital location give rise to comparative hearing rights. In general, assignments of orbital locations balance each applicant's request with several competing factors. These include the volume and distribution of traffic requirements, constraints imposed by satellite design, plans of other countries for their satellites, and equitable treatment of existing and new domestic satellite operators. Additionally, we seek to minimize the number of relocations of in-orbit satellites and the resulting disruption of service to domestic satellite users. Finally, we attempt to afford new entrants, when possible, at least one initial orbital location in the portion of the orbital arc that allows them to provide maximum quality service to all 50 states.[14]

4. This process has allowed new domestic fixed-satellite facilities to be authorized without the cost or delays associated with comparative hearings. While it is impossible to satisfy fully the preferences of each applicant, we have been able to accommodate the requests of all qualified applicants to construct, launch, and operate domestic fixed-satellites. The orbital assignment plan adopted in this order reflects our administrative discretion to balance the desires of licensees with our ultimate objective of ensuring that service is provided to the public in a timely and efficient manner.[15]

III. DISCUSSION

A. General Approach

5. The cornerstone of our orbital assignment plan is the uniform 2^0 spacing policy adopted in 1983 in *Reduced Orbital Spacing* [16] and implemented in 1985.[17] This policy – to reduce orbital spacings between adjacent domestic fixed-satellites to 2^0 at both 4/6 GHz and 12/14 GHz – was designed to maximize the number of satellites that could be accommodated in orbit so that the increasing demand for satellite services could be met.

6. We assign domestic satellites to orbital locations today between 64^0 West Longitude (W.L.) and 143^0 W.L. at 4/6 GHz,[18] and between 64^0 W.L. and 135^0 W.L. at 12/14 GHz.[19] The central portion of this arc is used to accommodate Mexican and Canadian satellites, and therefore the usable arc for domestic satellites of the United States is comprised of an eastern and western segment. In the *1985 Orbit Assignment Order*, 120^0 W.L and 105^0 W.L. were established as the endpoints of the arc available for assignment for U.S. domestic satellites, and satellites were assigned at 2^0 intervals from these endpoints.[20] However, as the result of the recent trilateral arrangement reached among the Administrations of Mexico, Canada and the U.S., several of these assignments must be adjusted. In the western portion of the arc, U.S. domestic assignments will begin at 121^0 W.L.[21] Thus, we must adjust orbital assignments in the west by 1^0 from those made in the *1985 Orbit Assignment Order* in order to provide for uniform 2^0 spacings beginning from 121^0 W.L.[22] In the eastern portion of the arc, U.S. domestic assignments will begin at 105^0 W.L.[23] This permits us to retain generally the assignments specified in the *1985 Orbit Assignment Order* for

the eastern portion of the arc. As in our previous assignment orders, the orbital assignments we make here form the basis for conducting international frequency coordination.

7. Within this framework, there are a sufficient number of orbital locations available to allow us to grant the applications of all qualified domestic fixed-satellite applicants. However, we will not assign orbital locations to AMSC for feeder links for its proposed MSS system.[24] First, AMSC's proposal to locate its feeder links at 12/14 GHz violates our instruction to the consortium in the *MSS Licensing Order* to propose frequencies for its feeder links in fixed-satellite frequency bands other than those used by domestic fixed-satellites.[25] Our rationale for that instruction was that it would be difficult to accommodate MSS feeder links in the already-crowded arc used by domestic fixed-satellites. Second, AMSC states that it needs 100 MHz of spectrum for uplink transmissions and 100 MHz of spectrum for downlink transmissions.[26] Allowing AMSC to occupy an orbital location in which it needs only 100 MHz of spectrum would constitute an inefficient use of the spectrum. Fixed-satellites operating in the 12/14 GHz band are allocated to use 500 MHz of spectrum for uplink transmissions and 500 MHz for downlink transmissions.[27] The Commission's technical standards require all fixed-satellite operators to use the entire 500 MHz employing full frequency re-use.[28] Authorizing AMSC to occupy orbital locations where it intends to use only 100 MHz of the available 500 MHz of spectrum would violate these technical standards and would be spectrally inefficient. We also reject AMSC's proposal that we require the MSS satellite and a domestic fixed-satellite to co-locate at one orbital location and together use the entire 500 MHz. AMSC would use 100 MHz for its feeder links and the domestic fixed-satellite operator would use the remaining 400 MHz of bandwidth to provide domestic fixed-satellite services. We will not disadvantage certain domestic fixed-satellite operators by precluding them from operating on a significant portion of their allocated spectrum, especially when other alternatives are available.[29]

8. The following table summarizes the number of orbital locations previously assigned and also authorized today to each qualified satellite licensee.[30] In addition, we grant all requests for replacement satellites[31] that are ripe for disposition at this time.[32]

Company Name	Number of Orbital Locations (Authorized) by Frequency Band (GHz)					
	Previous		Additional		Total	
	4/6	12/14	4/6	12/14	4/6	12/14
Alascom, Inc.	1	-	-	-	1	-
American Telephone & Telegraph Co.	3	-	-	2	3	2
Comsat General Corp.	-	1	-	-	-	1
Contel ASC	2	2	1	1	3	3
GE American Communications, Inc.	4	3	1	1	5	4
GTE Spacenet Corp.	3	6	-	1	3	7
Hughes Communications Galaxy, Inc.	7	-	1	2	8	2
MCI Communications Corp.	-	1	-	-	-	1
National Exchange Satellite, Inc.	-	-	2	2	2	2
Safecom Partnership	1	-	-	-	1	-
Satellite Transponder Leasing Corp.	-	3	-	-	-	3
Total	21	16	5	9	26	25

B. Specific Orbital Assignments

9. Although in assigning locations we attempt to retain, to the extent possible, current orbital assignments and to minimize relocations of in-orbit satellites,[33] certain satellites must be reassigned. This section of the order discusses those satellites.

1. GTE Spacenet Satellites

10. GTE Spacenet Corporation (GTE Spacenet) operates satellites on both sides of the central arc shared by Canada and Mexico. It is currently authorized to operate its Spacenet 1 4/6 GHz and 12/14 GHz hybrid satellite at 120^0 W.L., its GSTAR 2 12/14 GHz satellite at 105^0 W.L., and its GSTAR 1 12/14 GHz satellite at 103^0 W.L. GTE Spacenet's requests for authority to construct and launch replacements for these satellites are granted in a separate order today.[34] As a result of the recent U.S.-Mexican-Canadian arrangement, however, the 4/6 GHz portion of the current U.S. hybrid assignment at 120^0 W.L. will not be available to accommodate new U.S. satellites.[35] Instead, the U.S. will obtain an additional 4/6 GHz location at 103^0 W.L., which, together with our current 12/14 GHz location at 103^0 W.L., render that location capable of accommodating a hybrid satellite. We will therefore assign the replacement satellite for Spacenet 1 – Spacenet 1R – to 103^0 W.L. To accommodate Spacenet 1R at 103^0 W.L., GSTAR 1 and its replacement will be assigned to 121^0 W.L.

2. Other 4/6 GHz Assignments

11. Aside from the 1^0 readjustment in the western portion of the arc and the reassignments for GTE Spacenet necessary to implement the trilateral arrangement, current orbital assignments at 4/6 GHz can remain unchanged. We note, however, that one of National Exchange Satellite, Inc.'s (NEXSAT's) 4/6 GHz and 12/14 GHz hybrid high power density Spotnet satellites is assigned to the 76^0 location where the 4/6 GHz Comstar D2 and D4 satellites licensed to Safecom Partnership (Safecom) are currently operating. We do not expect that this situation will create problem. NEXSAT's satellites will not be launched until mid-to-late 1993. At that time, the Comstar D2 and D4 satellites will be over seventeen and twelve years old, respectively. This is well beyond their projected seven year lives and ten year license terms.[36] In fact, the satellites were co-located in 1985 because neither was fully operational. We will not permit Comstar D2/D4 or other satellites operating past their license terms at minimal capacity to block entry by qualified applicants proposing state-of-the-art satellites that will provide maximum quality service to the public. If Comstar D2 and D4 have any remaining capacity when NEXSAT's satellite is launched, we will entertain a request by Safecom to assign these satellites, on temporary basis, to another unassigned 4/6 GHz location.[37]

12. Finally, we note that the 85^0 W.L. orbital location at 4/6 GHz currently occupied by AT&T's Telstar 302 satellite will be available for reassignment to a qualified applicant in the next domestic fixed-satellite processing group. The 4/6 GHz transponders on the two hybrid satellites authorized to AT&T today are intended to replace the Telstar 301 and Telstar 302 4/6 GHz satellites. While we can assign one of AT&T's new hybrid 4/6 GHz and 12/14 GHz satellites to the 97^0 W.L. location assigned to Telstar 301,[38] we cannot assign a hybrid satellite to 85^0 W.L. because a 12/14 GHz satellite -- Satcom K1 -- is currently operating at that location. Thus, AT&T's second hybrid satellite is assigned to 89^0 W.L. We will permit AT&T to operate Telstar 302 at 85^0 W.L. until the satellite intended to replace it is launched and operational.[39]

3. Other 12 / 14 GHz Assignments

13. As in the 4/6 GHz band, orbital locations in the western portion of the 12/14 GHz arc must be adjusted by 1^0 and GTE Spacenet must relocate its 12/14 GHz GSTAR 1 satellite to satisfy the terms of the trilateral arrangement. In addition to these adjustments at 12/14 GHz, we further implement our arc segmentation policy for high power density satellites.[40] We have set aside two discrete segments of the orbital arc -- from 132^0 to 136^0 W.L. and from 75^0 to 79^0 W.L. -- to accommodate 12/14 GHz high power density satellites that cannot be easily coordinated with lower power density satellites. In this order, we readjust the western segment from 133^0 W.L. to 137^0 W.L. to conform to the trilateral arrangement, and the eastern segment from 74^0 W.L. to 79^0 W.L. to conform with current spacings in the 4/6 GHz band. We assign the high power density hybrid satellites proposed by GE Americom and NEXSAT to these portions of the arc.[41] The remaining satellites proposed in this processing group are assigned to the traditional arc.[42]

14. To accommodate one of NEXSAT's hybrid satellites at 76^0 W.L.,[43] we reassign SBS-1 and SBS-2, which are assigned to 75^0 W.L., but have temporary authority to operate at 99^0 W.L., to 74^0 W.L. While this is in the high power density portion of the arc, NEXSAT's adjacent satellite will not be launched until mid-to-late 1993. By that time, the license terms of both SBS-1 and SBS-2 will have expired.[44] If any useful life remains on SBS-1 or SBS-2, we will entertain a request by the licensee, Comsat General Corporation, to reassign these satellites, on a temporary basis, to another unassigned 12/14 GHz location. We also reassign Satellite Transponder Leasing Corporation's (STLC's) unlaunched SBS-6 satellite from 62^0 W.L. to 72^0 W.L., which recently became available for reassignment.[45]

4. Implementation

15. The Appendix contains the new set of orbital assignments. A licensee operating a satellite at a location not in conformance with its current assignment may continue to operate at its present location until it becomes necessary to move the satellite to its assigned location to accommodate another satellite.[46] Because the satellites authorized today are to be launched at different times, we recognize that some licensees will be required to operate at 2^0 spacings sooner than others. In this regard, we require all licensees to cooperate in implementing this plan and in resolving any interference problems as they arise. All satellite operators are also required to coordinate their orbital maneuvers with other affected satellite operators. If particular problems cannot be resolved by the parties, they may be brought to the Commission for resolution.

16. Further, we do not intend to preclude operators from identifying alternatives to the orbital assignment plan. As with all previous assignment plans, we will entertain requests for changes in the assignments made today if they are consistent with the basic structure of our assignment plan, and are agreed to by all, or at least most, of the satellite operators affected by the change. If all operators do not agree, the burden is on the operator proposing the change to demonstrate that its alternative is preferable to the adopted plan. Satellite operators may apply for reassignment to all locations that remain available after today's order. However, NEXSAT, as a new entrant that is not currently assigned to any locations capable of providing 50 state coverage, will be given priority when assigning any of the unassigned 50 state coverage locations. Any alternative orbital arrangement, including requests for any unassigned orbital location by NEXSAT or others, must be presented to the Commission for approval within 30 days of the release of this order.

IV. CONCLUSION

17. We find, upon review of the applications and record before us, that pursuant to Section 309 of the Communications Act, 47 U.S.C. § 309, the public interest, convenience and necessity will be served by adopting the orbital location assignments specified in the Appendix.

18. Accordingly, IT IS ORDERED that the orbital assignments specified in the Appendix ARE ADOPTED and the licensees of these space stations shall promptly undertake all actions necessary to implement this orbital location plan, including coordination with other domestic satellite operators.

19. IT IS FURTHER ORDERED that the orbital location assignments specified in *Domestic Fixed - Satellite Service*, 50 Fed. Reg. 35228 (August 30, 1985), as modified in *Comsat General Corporation*, 2 FCC Rcd 4570 (1987),

Comsat General Corporation, 3 FCC Rcd 4071 (1988), ARE MODIFIED in accordance with the orbital location assignment plan as specified in the Appendix.

20. IT IS FURTHER ORDERED that the assignment of any orbital location is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to the use of the orbit or spectrum.

21. IT IS FURTHER ORDERED that these orbital assignments are effective thirty days from the release of this order.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Orbital Assignments

143^0 W.L.	Aurora-1	4/6 GHz (vertical)
141^0 W.L.	Galaxy-4	4/6 GHz (horizontal)
139^0 W.L.	Satcom-1R	4/6 GHz (vertical)
137^0 W.L.	Aurora-2	4/6 GHz (horizontal)
137^0 W.L.	unassigned	12/14 GHz
135^0 W.L.	Spotnet-1	4/6 (vertical)/12/14 GHz
133^0 W.L.	Galaxy-1/1R	4/6 GHz (horizontal)
133^0 W.L.	unassigned	12/14 GHz
131^0 W.L.	Satcom-3R	4/6 GHz (vertical)
131^0 W.L.	Galaxy-B	12/14 GHz
129^0 W.L.	ASC-1/Contelsat-2	4/6 (horizontal)/ 12/14 GHz
127^0 W.L.	unassigned	4/6 GHz (vertical)
127^0 W.L.	unassigned	12/14 GHz
125^0 W.L.	Westar-5/5R	4/6 GHz (horizontal)
125^0 W.L.	GSTAR-3	12/14 GHz
123^0 W.L.	Telstar-303	4/6 GHz (vertical)
123^0 W.L.	SBS-5	12/14 GHz
121^0 W.L.	GSTAR-1/1R	12/14 GHz
105^0 W.L.	GSTAR-2	12/14 GHz
103^0 W.L.	Spacenet-1R	4/6 (horizontal)/12/14 GHz
101^0 W.L.	Contelsat-1	4/6 GHz (vertical)/12/14 GHz
99^0 W.L.	Westar-4/4R	4/6 GHz (horizontal)
99^0 W.L.	Galaxy-A	12/14 GHz
97^0 W.L.	Telstar-301/Telstar-401	4/6 (vertical)/12/14 GHz
95^0 W.L.	Galaxy-3/3R	4/6 (horizontal)
95^0 W.L.	SBS-3	12/14 GHz
93^0 W.L.	unassigned	4/6 GHz (vertical)
93^0 W.L.	unassigned	12/14 GHz
91^0 W.L.	Westar 6-S	4/6 GHz (horizontal)
91^0 W.L.	SBS-4	12/14 GHz
89^0 W.L.	Telstar-402	4/6 (vertical)/12/14 GHz
87^0 W.L.	Spacenet-3	4/6 (horizontal)/12/14 GHz
85^0 W.L.	Telstar-302	4/6 GHz (vertical)
85^0 W.L.	Satcom-K3	12/14 GHz
83^0 W.L.	ASC-2	4/6 (horizontal)/12/14 GHz
81^0 W.L.	Satcom-4	4/6 GHz (vertical)
81^0 W.L.	Satcom-K2	12/14 GHz
79^0 W.L.	Satcom H-1	4/6 (horizontal)/12/14 GHz
76^0 W.L.	Comstar D2/D4/Spotnet-2	4/6 (vertical)/12/14 GHz
74^0 W.L.	Galaxy-2/2R	4/6 GHz (horizontal)
74^0 W.L.	SBS-1/2	12/14 GHz
72^0 W.L.	Satcom-2R	4/6 GHz (vertical)
72^0 W.L.	SBS-6	12/14 GHz
69^0 W.L.	Spacenet-2/2R	4/6 (horizontal)/12/14 GHz
67^0 W.L.	unassigned	4/6 GHz (vertical)
67^0 W.L.	Satcom-K1	12/14 GHz
64^0 W.L.	Galaxy-5	4/6 GHz (horizontal)
64^0 W.L.	GSTAR-4	12/14 GHz
62^0 W.L.	unassigned	4/6 GHz (vertical)
62^0 W.L.	unassigned	12/14 GHz

FOOTNOTES

[1] *See* Alascom, Inc., FCC 88-374 (adopted November 17, 1988); American Telephone and Telegraph Co., FCC 88-375 (adopted November 17, 1988); Contel ASC, FCC 88-376 (adopted November 17, 1988); GE American Communications, Inc., FCC 88-377 (adopted November 17, 1988); GTE Spacenet Corporation, FCC 88-378 (adopted November 17, 1988); Hughes Communications Galaxy, Inc., FCC 88-379 (adopted November 17, 1988); National Exchange Satellite, Inc., FCC 88-380 (adopted November 17, 1988).

[2] Four satellites are authorized as on-ground spares only. One satellite previously authorized as an in-orbit spare (GSTAR 4) is assigned to an additional location.

[3] *See* Domestic Communications Satellite Facilities, 22 FCC 2d 86 (1970), 35 FCC 2d 844 (1972), *recon. in part*, 38 FCC 2d 665 (1972) (*Domsat I, II*, and *III*, respectively).

[4] *See* Domestic Fixed-Satellite Service, 88 FCC 2d 318 (1981).

[5] *See* Western Union Telegraph Co., 38 FCC 2d 1197, 40 FCC 2d 1123 and 41 FCC 2d 379 (1973); American Telephone and Telegraph Co., 42 FCC 2d 1141 (1973); GTE Satellite Corp., 43 FCC 2d 1141 (1973); Comsat General Corp., 42 FCC 2d 677 (1973).

[6] Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, 84 FCC 2d 584 (1981) (*1980 Assignment Order*).

[7] Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, 94 FCC 2d 129 (1983), *recon.* FCC 84-32 (February 2, 1984), *further recon.*, FCC 84-181 (May 15, 1984) (*1983 Assignment Order*).

[8] Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, 50 Fed. Reg. 35228 (August 30, 1985) (*1985 Assignment Order*).

[9] Public Notice, Report No. DS-635 (June 10, 1987). These applications were required to be filed by September 15, 1987.

[10] One of the applications filed by GE American Communications, Inc. (GE Americom) was subsequently withdrawn. In addition, a group comprised of five applicants in the proceeding to establish a mobile satellite service (MSS) (Gen. Docket No. 84-1234) filed a letter requesting that the Commission reserve appropriate spectrum in the 12/14 GHz frequency bands for the ultimate MSS licensee for operation of its feeder links. *See* Letter from Counsel, Satellite Mobile Telephone Company, MCCA Space Technologies Corp., Skylink Corp., Hughes Communications Mobile Satellite Services, Inc., and McCaw Space Technologies, Inc. to Secretary, Federal Communications Commission (September 15, 1987). A consortium of all eight of the qualified applicants, American Mobile Satellite Corp. (AMSC), subsequently filed an amended application for an MSS system requesting orbital locations at 75^0 W.L. , 101^0 W.L. , and 136^0 W.L. for 12/14 GHz feeder link operations. *See* AMSC Technical Proposal (February 1, 1988), AMSC Consolidated Opposition and Response (July 26, 1988) in Gen. Docket No. 84-1234. AMSC later indicated that it had reached an agreement with National Exchange Satellite, Inc. (NEXSAT) regarding colocation of AMSC's proposed satellites with NEXSAT's. *See* Letter from Counsel, NEXSAT to Secretary, FCC (September 9, 1988).

[11] The applications for three of these satellites, filed by GE American Communications, Inc., are not ripe for action at this time. *See* note 32, *infra*.

[12] 35 FCC 2d at 846-847.

[13] *See 1985 Orbit Assignment Order*, *supra* note 8, at para. 3; *1983 Orbit Assignment Order*, *supra* note 7, at para. 4; *1980 Orbit Assignment Order*, *supra* note 6, at paras. 44-50.

[14] *But see* GE American Communications, Inc., FCC 88-359 (adopted November 3, 1988) (recognizing that 50 state coverage may not be possible for each satellite located in the high power density portion of the orbital arc).

[15] *See, e.g.*, United States v. FCC, 652 F.2d 72 (D.C. Cir. 1980).

[16] Licensing of Space Stations in the Domestic Fixed-Satellite Service, 54 Rad. Reg. 2d (P&F) 577, 589 (1983) (*Reduced Orbital Spacing*).

[17] Uniform 2^0 spacings were assigned to satellites in our *1985 Orbit Assignment Order*, *supra* note 8, when 20 satellites were authorized to be launched. However, many of these authorizations were later relinquished as licensees decided not to proceed with their initial plans. The orbital locations assigned to those satellites are therefore now available for reassignment.

[18] Orbital locations between about 53^0 and 143^0 W.L. generally provide an earth station elevation angle of at least 5^0 throughout the contiguous states.

[19] Orbital locations between about 60^0 and 135^0 W.L. provide a minimum 10^0 earth station elevation angle throughout the contiguous states. This higher elevation angle is desirable at 12/14 GHz to reduce the impact of increased propagation impairments at these higher frequencies.

[20] The 105^0 W.L. and 103^0 W.L. locations were available for U.S. domestic 12/14 GHz satellites only. Further, several adjustments to uniform 2' separations between U.S. and certain South American satellites were made at 4/6 GHz to fulfill our long-standing commitment to accommodate the requirements of other countries through the international coordination process. As a result, 3^0 separations are provided between 79^0 W.L. and 76^0 W.L. , between 72^0 W.L. and 69^0 W.L. , and between 67^0 W.L. and 64^0 W.L.

[21] The 121^0 W.L. location will be available for a 12/14 GHz satellite only.

[22] In this regard, we note that Aurora 1, Satcom 3R, and Satcom 1R are currently operating at locations consistent with 2^0 spacing from $121,^0$ W.L. Thus, these satellites can remain at their current locations, and need not relocate. Galaxy 1, ASC 1, and GSTAR 1 are the only in-orbit satellites that will be required to relocate as the result of the trilateral arrangement.

[23] The 105^0 W.L. location will be available for a 12/14 GHz satellite only.

[24] "Feeder links" are the transmission links between a fixed central earth station and the satellite. In this case, they will interconnect mobile users via the satellite with other fixed communications networks. For example, a transmission from a mobile user would be received by the satellite and retransmitted via the feeder link to a central earth station for transmission to the desired party.

[25] Amendment of Parts 2, 22 and 25 of the Commission's Rules to Allocate Spectrum for, and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services, Second Report and Order, 2 FCC Rcd 485 (1986) (*MSS Licensing Order*), at para. 30. *See also* Report and Order, 2 FCC Rcd 1825 (1986), at para. 156; Notice of Proposed Rule Making, 50 Fed. Reg. 8149 (Feb. 28, 1985), at para. 22.

[26] *See* note 10, *supra*.

[27] 47 C.F.R. § 2.106. Specifically, the 11.7-12.2 GHz band is allocated for space-to-Earth transmissions and the 14.0-14.5 GHz band is allocated for Earth-to-space transmissions.

[28] *See Reduced Orbital Spacing*, *supra* note 16, at n. 67.

[29] For example, the 6425-6725 MHz, the 17.8-20.2 GHz, and the 27.5-30.0 GHz frequency bands are among those that may be used for MSS feeder links. A voluntary arrangement between the parties would also be acceptable. For example, if AMSC prefers other fixed-satellite frequency bands for its feeder link requirements, we would not be adverse to AMSC acquiring 100 MHz of either 4/6 GHz or 12/14 GHz capacity from a domestic fixed-satellite licensee, AMSC allowing the capacity on the domestic fixed-satellite to remain unused, and, in turn, using corresponding frequencies on its MSS satellite for feeder link operations. We recognize that AMSC has reached such an understanding with NEXSAT, but will not assign the NEXSAT satellites to particular orbital locations because of the AMSC-NEXSAT agreement, given the technical characteristics of the NEXSAT satellites. *See* note 41, *infra*.

[30] Because hybrid satellites occupy both the 4/6 GHz and 12/14 GHz portions of an orbital assignment, the numbers contained in the chart do not reflect the actual number of authorized in-orbit satellites. With today's grants, we have authorized a total of 11 hybrid satellites, making the total number of authorized in-orbit satellites (including those that are co-located) 42.

[31] Several applicants urge us to establish a concrete satellite replacement expectancy at this time. They state that given the long lead time and capital investment necessary in the domestic satellite industry, operators and users must be protected by a measure of certainty that they will be able to replace retired satellites with new satellites at the same location. *See* comments of GTE Spacenet, Hughes; reply comments of Contel ASC. We agree that given the capital-intensive nature of the domestic satellite industry, there should be some assurance that operators will be able to continue to serve their customers. To do otherwise would discourage investment and impose large costs on users. However, there may be instances where, for various reasons, we may not authorize a replacement satellite at the same location. For example, the location may no longer be available for assignment to a U.S. satellite, assignments may need to be changed to implement domestic fixed-satellite policy (such as reduced spacing), the replacement satellite's technical design may require it be located in other portions of the arc to avoid it causing harmful interference into adjacent, older satellites, or other factors may be present that warrant reassignment. We have therefore consistently emphasized that all orbital locations are temporary and confer no permanent rights of use to the assignee. *See, e.g.*, Licensing of Space Stations in the Domestic Fixed-Satellite Service, 50 Fed. Reg. 36071 (September 5, 1985) (*1985 Report and Order*), at para. 27. This concept is also embodied in Resolution 2 to the International Telecommunication Union Radio Regulations. However, when the location is available for assignment to a satellite with the technical characteristics of the proposed replacement satellite, we will generally authorize the replacement satellite at the same location.

[32] After the September 15, 1987 cut-off date, several licensees filed additional requests for replacement satellites, expressing confusion as to whether applications for replacement satellites, in addition to applications for expansion satellites, were required to be filed on the cut-off date. We accepted the post-September 15 applications for filing and permitted other licensees to file applications for replacement satellites. *See* Public Notice, Report No. DS-765, 3 FCC Rcd 4795 (1988). In response, GE American Communications, Inc. filed applications

for three replacement satellites. These have been placed on public notice (*see* Report No. DS-790, DA 88-1670 (released November 15, 1988)) but the pleading cycle has not yet been completed. We will, however, consider all other pending domestic fixed-satellite applications at this time because they are ripe for action and because doing so will not disadvantage GE Americom. By definition, no additional orbital positions are needed to accommodate replacement satellites, and GE Americom's requests for replacements may therefore be granted in subsequent orders.

[33] Our new orbital assignment plan is contained in the Appendix.

[34] *See* GTE Spacenet Corporation, *supra* note 1.

[35] Under the trilateral arrangement, Spacenet 1 may remain at its current 120^0 W.L. location until it ceases operation at 12/14 GHz.

[36] Comstar D2 was launched in September 1976 and is currently operating under special temporary authority. Comstar D4 was launched in February 1981 and its license term will expire in February 1991.

[37] In this regard, Safecom will not be disadvantaged by relocating Comstars D2/D4 or any replacements for these satellites at another location. Safecom has received special temporary authority to discontinue north-south stationkeeping on Comstars D2/D4. *See* Letter from Chief, Domestic Facilities Division to Counsel, COMSAT General Corp. (February 29, 1988); as amended by Letters from Chief, Domestic Facilities Division to Counsel, Safecom Partnership (March 3, 1988; July 5, 1988). Thus, it must use earth stations capable of tracking the satellites to transmit and receive, *i.e.*, the earth station must continously reorient itself to maintain a proper pointing angle to the satellite. Because all earth stations receiving service via Comstar D2/D4 must have this capability, the antennas can be repointed with no additional cost if the satellites or their replacements are assigned to a location other than 76^0.

[38] Telstar 301 is assigned to 97^0 W.L. by the *1985 Orbital Assignment Order*, *supra* note 8, but is currently operating at 96^0 W.L.

[39] Similarly, the 143^0 W.L. location currently occupied by Alascom, Inc.'s Aurora 1 satellite will be available for reassignment when the replacement for that satellite is, at Alascom's request, launched into a more easterly location. *See* Alascom, Inc., *supra* note 1.

[40] *See* GE American Communications, Inc., *supra* note 14.

[41] NEXSAT states that its Spotnet satellites can be coordinated with lower power density satellites at 12/14 GHz and requests locations outside the high power density arc. It asserts that its single channel per carrier (SCPC) services would suffer signficant interference if assigned adjacent to a high power density video satellite, such as GE Americom's. It also asserts that it should be assigned to 93^0 W.L. and 101^0 W.L. in light of an agreement it has reached with AMSC regarding MSS feeder link operations. *See* note 10, *supra*. However, several domestic fixed-satellite operators, including GTE Spacenet, Contel ASC, and AT&T, assert that NEXSAT's proposed operations would result in significant interference into nominal SCPC services operating in adjacent locations. NEXSAT's proposed power density levels -- up to a maximum of 31 dBW per SCPC carrier -- are signficantly higher than those levels currently authorized and those proposed by most applicants. Thus, we assign it to the high power density arc segment. However, two hybrid locations capable of providing 50 state coverage, 93^0 W.L. and 127^0 W.L. , remain unassigned after today's authorizations. If NEXSAT can successfully coordinate its satellites with those of operators adjacent to either of those locations, we will entertain a request by NEXSAT to be reassigned to one of those locations in conformance with our policy to provide new entrants with at least one location capable of 50 state coverage. *See* para. 3, *supra*. We will not assign NEXSAT to specific orbital locations because of its agreement with AMSC. We have stated that satellites providing primarily fixed-satellite service will be assigned locations in accordance with fixed-satellite service policies and requirements. *See* GTE Spacenet Corp., 2 FCC Rcd 5312 (1987), at para. 19. Moreover, AMSC requested 12/14 GHz feeder link assignments at 75^0 W.L. and 136^0 W.L. NEXSAT's satellites are assigned today to 76^0 W.L. and 135^0 W.L., and 93^0 W.L. is available for NEXSAT if its satellite can be successfully coordinated at that location.

[42] AT&T suggests that a standard frequency plan should be adopted for 12/14 GHz satellites to facilitate coordination. This would require satellite operators to place compatible services on corresponding frequencies to aid in coordination. Other applicants disagree with AT&T's proposal, stating that a standard plan would impede innovation and reduce operators' flexibility in designing systems. *See* reply comments of GTE Spacenet, Hughes, STLC. We believe that a standard 12/14 GHz frequency plan is not necessary at this time, and that transmissions on adjacent satellites can continue to be successfully coordinated through established methods. For example, in the 4/6 GHz band, SCPC and video transmissions are typically coordinated with the video carrier using energy dispersal over only the center 2 MHz of a particular transponder and the SCPC or low capacity carriers using frequencies sufficiently removed from the center. This method could be used in the 12/14 GHz band. In addition, the establishment of discrete arc segments to isolate high power density satellites from lower power density satellites will signficantly reduce the potential for serious coordination problems.

[43] *See* para. 11, *supra*.

[44] SBS-1's license term expires in November 1990; SBS-2's in October 1991.

[45] Hughes has relinquished its license for its Galaxy A satellite, which was assigned to 71^0 W.L. A satellite positioned at 62^0 W.L. cannot be "seen" from earth stations located in the westernmost sections of Alaska and Hawaii and therefore SBS-6's reassignment to 72^0 W.L. will allow better coverage of these states.

[46] In this regard, we expect licensees affected by a particular launch to complete any planning necessary to accommodate the new satellite at least two months prior to the scheduled launch. At that time, the licensee of the satellite to be launched may submit to us a report describing these activities.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

ALASCOM, INC. File No. 6014-DSS-P/LA-87

For Authority to Construct, Launch and Operate A Space Station in the Domestic Fixed-Satellite Service

ORDER AND AUTHORIZATION

Adopted: November 17, 1988; Released: December 7, 1988

By the Commission:

1. Alascom, Inc. (Alascom) seeks authority to construct, launch and operate a 4/6 GHz domestic fixed-satellite as a replacement for its currently operational Aurora I satellite.[1] No comments were filed concerning this application. For the reasons discussed below, we grant Alascom's application.

2. Alascom is a regulated telecommunications carrier providing intrastate and interstate long distance communications services for Alaska. Alascom is a wholly-owned subsidiary of Pacific Telecom, Inc. which, in turn, is a subsidiary of PacifiCorp.

3. The Aurora I satellite, which is currently operating at 143^0 W.L., reaches the end of its projected useful life in 1991. The proposed replacement satellite, Aurora II, will have 24 transponders, each with a 36 MHz bandwidth and 10 watts of nominal power output. The satellite will transmit on twelve transponders to Alaska only, with an edge of coverage effective isotropically radiated power (EIRP) of 38 dBW. The remaining twelve transponders will transmit to Alaska, the 48 contiguous United States (CONUS) and Hawaii, with edge of coverage EIRP values of 34, 34 and 26 dBW, respectively. All 24 transponders will be able to receive from Alaska, CONUS and Hawaii. Alascom proposes to launch Aurora II in March 1991. It also proposes to provide service on a common carrier basis. Alascom estimates that the cost to construct and to launch Aurora II and to operate it for one year is147.3 million. The applicant asserts that it and its parent company, Pacific Telecom, Inc., have substantial financial resources in excess of the amount required to implement the proposed system.

4. Upon reviewing the application, we find that Alascom is legally, technically, financially and otherwise qualified to construct, launch and operate its proposed satellite pursuant to Section 25.391 of the Commission's rules, 47 C.F.R. § 25.391.[2] However, the appropriate market structure for the Alaska interstate telecommunication market is an issue in CC Docket No. 83-1376. We have referred that issue to a Federal/State Joint Board pursuant to Section 410(c) of the Communications Act, 47 U.S.C. § 410(c), for a recommendation on, *inter alia*, how to harmonize our rate integration and procompetitive policies for Alaska. [3] This authorization is in no way to be construed as prejudging any of the issues in that proceeding. Furthermore, Alascom will be expected to operate Aurora II in accordance with any revised market rules adopted in CC Docket No. 83-1376.

5. Accordingly, IT IS ORDERED that Application File No. 6014-DSS-P/LA-87 IS GRANTED and Alascom, Inc. IS AUTHORIZED to construct one domestic communications fixed-satellite in accordance with the terms, conditions, and technical specifications set forth in the application. This authorization is without prejudice to final Commission action in CC Docket No. 83-1376 and Alascom will be required to operate Aurora II in accordance with any revised market rules adopted in that proceeding.

6. IT IS FURTHER ORDERED that Alascom, Inc. IS AUTHORIZED to launch and operate this space station in the domestic Fixed-Satellite Service in accordance with the *1988 Orbit Assignment Order*, FCC 88-373 (adopted November 17, 1988), as well as the relevant terms and conditions of all previous orders and authorizations concerning the operation of space stations. These requirements include the filing of semi-annual reports on the progress of space station construction and current satellite operational status and transponder loading, as described in *1980 Orbit Assignment Order*, 84 FCC 2d 584, 611-612 (1981) and *1983 Domestic Fixed Satellite Licensing Order*, 54 Rad. Reg. 2d (P&F) 577 (1983), at para. 91.

7. IT IS FURTHER ORDERED that, unless extended by the Commission for good cause shown, this authorization shall become null and void in the event the space station is not constructed, launched, and successfully placed into operation in accordance with the technical parameters and terms and conditions of this authorization by the following dates, as certified in writing to the Commission by the licensee:

	Construction Commenced	Construction Completed	Launched
Aurora II	February 1989	May 1991	July 1991

8. IT IS FURTHER ORDERED that the license term for the space stations is ten years and will begin to run on the date the licensee certifies to the Commission that the satellite has been successfully placed into orbit and the operations fully conform to the terms and conditions of this authorization.

9. IT IS FURTHER ORDERED that Alascom, Inc., as required by Section 25.202 (c) of the Commission's rules, 47 C.F.R. § 25.202 (c), will prepare the necessary submissions to the International Telecommunication Union (ITU) for advance publication, international coordination and notification of these space stations in accordance with the ITU Radio Regulations and for consultation in accordance with Article XIV of the INTELSAT Agreement within sixty days of the release of this order.

10. IT IS FURTHER ORDERED that the temporary assignment of any orbital location to Alascom, Inc. is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to use the orbit and spectrum. Neither this authorization, nor any right granted by this authorization, shall be transferred, assigned or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any per-

son except upon application to the Commission and upon a finding by the Commisision that the public interest, convenience and necessity will be served thereby.

11. Alascom, Inc. is afforded thirty days from the date of release of this order and authorization to decline this authorization as conditioned. Failure to respond within that period will constitute formal acceptance of the authorization as conditioned.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Although Aurora I is currently operating at 143^0 W.L., Alascom, supported by GE American Communications, Inc., (GE Americom) requests that the replacement satellite be assigned to 138^0 W.L. so that it can meet the needs of one of its customers. This would require reassigning GE Americom's Satcom IR satellite, which is currently operating at 139^0 W.L., to 136^0 W.L. *See* Alascom Amendment to Application (September 27, 1988); Letter from Counsel, GE Americom to Chief, Common Carrier Bureau (September 27, 1988).

[2] Further, while we can accommodate Alascom's unopposed request for a more easterly location for Aurora II, we cannot authorize the "exchange" of orbital locations between Aurora II and Satcom IR. This is because Satcom IR's polarization sense at the requested location is inconsistent with our assignment plan at 4/6 GHz. *See* Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, FCC 88-373 (adopted November 17, 1988) (*1988 Assignment Order*).

[3] Integration of Rates and Services, 50 Rad. Reg. 41714 (October 15, 1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Applications of

AMERICAN	File Nos. 6028-DSS-P/LA-87
TELEPHONE AND	6029-DSS-P/LA-87
TELEGRAPH	6030-DSS-P-87
COMPANY	

For Authority to Construct, Launch and Operate Space Stations in the Domestic Fixed-Satellite Service

ORDER AND AUTHORIZATION

Adopted: November 17, 1988; Released: December 7, 1988

By the Commission:

1. The American Telephone and Telegraph Company (AT&T) requests authority to construct and launch two hybrid 4/6 GHz and 12/14 GHz domestic fixed-satellites and to construct one on-ground spare. The 4/6 GHz capacity on the two in-orbit satellites is intended to replace AT&T's Telstar 301 and 302 satellites, which will be approaching their end-of-useful lives. No comments were filed concerning AT&T's applications. For the reasons discussed below, we grant AT&T's applications.

2. AT&T currently operates three 4/6 GHz domestic satellites -- Telstars 301, 302 and 303.[1] Each of AT&T's proposed hybrid satellites -- Telstars 401, 402 and 403 -- will have 24 transponders operating in the 4/6 GHz band and 24 transponders operating in the 12/14 GHz band. The 4/6 GHz transponders will each have a bandwidth of 36 MHz and an output power of 10 watts. Maximum edge of coverage effective isotropically radiated power (EIRP) will be 35 dBW. The 12/14 GHz transponders will each have a bandwidth of 36 MHz and an output power of 60 watts. Maximum EIRP will be 44 dBW. AT&T proposes to provide coverage to the 48 contiguous states, Alaska, Hawaii, Puerto Rico, and the U.S. Virgin Islands. AT&T estimates the cost to construct and launch its proposed system and to operate it for one year is 489 million. It requests orbit locations of 101^0 W.L. and 93^0 W.L., and proposes to offer its services on a common carrier basis. It proposes to launch Telstar 401 in December 1992 and Telstar 402 in December 1993.

3. AT&T asserts that its proposed system is required to meet its customers' needs into the next century. It states that the two in-orbit satellites will replace Telstars 301 and 302, which are currently nearly fully used. AT&T further states that the 12/14 GHz capacity will be used to replace transponders that it leases and to allow AT&T, as a new entrant in the 12/14 GHz band, to participate in the strong growth in demand for 12/14 GHz transponders. AT&T asserts that it is fully qualified to construct and launch its proposed system.

4. We find that pursuant to Section 309 of the Communications Act, 47 U.S.C. § 309, grant of these applications will serve the public interest, convenience and necessity. AT&T is legally, technically, financially and otherwise qualified to construct, launch and operate its proposed satellites pursuant to Section 25.391 of the Commission's rules, 47 C.F.R. § 25.391. We also find that grant of AT&T's request for launch authority for two hybrid satellites is consistent with our policies. AT&T has requested replacement capacity for Telstars 301 and 302 within a reasonable time frame[2] and as a new entrant in the 12/14 GHz frequency band, it may be awarded two initial 12/14 GHz orbital locations. [3] Issues involving the orbital assignments for AT&T's satellites are resolved in the *1988 Orbit Assignment Order* [4] and that discussion will not be repeated here.

5. Accordingly, IT IS ORDERED that Application File Nos. 6028-DSS-P/LA-87, 6029-DSS-P/LA-87 and 6030-DSS-P-87 ARE GRANTED and American Telephone and Telegraph Company IS AUTHORIZED to construct three domestic communications satellites in accordance with the technical specifications set forth in its applications.

6. IT IS FURTHER ORDERED that American Telephone and Telegraph Company IS AUTHORIZED to launch and operate two space stations in the domestic Fixed-Satellite Service in accordance with the *1988 Orbit Assignment Order*, FCC 88-373 (adopted November 17, 1988), as well as the relevant terms and conditions of all previous orders and authorizations concerning the operation of space stations. These requirements include the filing of semi-annual reports on the progress of space station construction and current satellite operational status and transponder loading, as described in *1980 Orbit Assignment Order*, 84 FCC 2d 584, 611-612 (1981) and *1983 Domestic Fixed Satellite Licensing Order*, 54 Rad. Reg. 2d (P&F) 577 (1983) at para. 91.

7. IT IS FURTHER ORDERED that unless extended by the Commission for good cause shown, each of the authorizations shall become null and void in the event the space station is not constructed, launched, and successfully placed into operation in accordance with the technical parameters and terms and conditions of these authorizations by the following dates:

	Construction Commenced	Construction Completed	Launched
Telstar 401	February 1989	September 1992	December 1992
Telstar 402	January 1990	September 1993	December 1993
Telstar 403	July 1989	March 1993	ground spare

8. IT IS FURTHER ORDERED that the license term for the space stations is ten years and will begin to run on the date the licensee certifies to the Commission that the satellite has been successfully placed into orbit and the operations fully conform to the terms and conditions of this authorization.

9. IT IS FURTHER ORDERED that American Telephone and Telegraph Company will prepare the necessary submissions to the International Telecommunication Union (ITU) for advance publication, international coordination and notification of these space stations in accordance with the ITU Radio Regulations and for

consultation in accordance with Article XIV of the INTELSAT agreement within sixty days of the release of this order.

10. IT IS FURTHER ORDERED that the temporary assignment of any orbital location to American Telephone and Telegraph Company is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to use the orbit and spectrum. Neither this authorization, nor any right granted by this authorization, shall be transferred, assigned or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commisision that the public interest, convenience and necessity will be served thereby.

11. American Telephone and Telegraph Company is afforded thirty days from the date of release of this order and authorization to decline this authorization as conditioned. Failure to respond within that period will constitute formal acceptance of the authorization as conditioned.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] These satellites were authorized in American Telephone and Telegraph Co., 94 FCC 2d 44 (1983), and Comsat General Corp., 85 FCC 2d 547 (1981).

[2] *See* Licensing Space Stations in the Domestic Fixed-Satellite Service, 50 Fed. Reg. 36071 (September 5, 1985), at para. 28.

[3] *See* 47 C.F.R. § 25.391(f).

[4] Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, FCC 88-373 (adopted November 17, 1988) (*1988 Orbit Assignment Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Applications of

CONTEL ASC — File Nos. 6025-DSS-P/LA-87
6026-DSS-P/LA-87
6027-DSS-P-87

For Authority to Construct, Launch and Operate Space Stations in the Domestic Fixed-Satellite Service

ORDER AND AUTHORIZATION

Adopted: November 17, 1988; Released: December 7, 1988

By the Commission:

1. Contel ASC seeks authority to construct, launch and operate two domestic fixed-satellites, one as a replacement for the ASC-1 satellite, and to construct a third satellite as an on-ground spare. All three satellites are hybrid satellites operating in both the 4/6 GHz and 12/14 GHz bands. No comments were filed concerning these applications. For the reasons discussed below, we grant the applications.

2. Contel ASC is a satellite communications common carrier and a wholly-owned subsidiary of Contel Corporation. Contel ASC is currently authorized to operate two hybrid satellites, one of which has been launched and is operating at 128^0 West Longitude (W.L.).[1]

3. All three proposed spacecraft will be identical in design. Each satellite will have 24 transponders operating in the 4/6 GHz bands and 16 transponders operating in the 12/14 GHz bands. The 4/6 GHz transponders will have a 36 MHz bandwidth and 11 watts of output power. The 12/14 GHz transponders will have a 54 MHz bandwidth and 60 watts of output power. The satellite coverage area at 4/6 GHz will be the 48 contiguous United States (CONUS), Alaska, Hawaii, and Puerto Rico at nominal effective isotropically radiated power (EIRP) values of 35 dBW, 33 dBW, and 31 dBW, respectively. The coverage areas at 12/14 GHz will be the same. Service at 12/14 GHz will be provided to CONUS at a nominal EIRP value of 46 dBW and to Alaska, Hawaii, Puerto Rico and the Caribbean at a nominal EIRP of 41 dBW. The satellites will also be able to direct higher EIRP levels toward either the eastern or western segments of the service area at 12/14 GHz. West or east CONUS coverage will be provided at 49 dBW, whereas Alaska, Hawaii, and Puerto Rico coverage will be provided at 44 dBW. Contel ASC requests orbital locations at 128^0 W.L. for the ASC-1 replacement and at 101^0 W.L. for its expansion satellite.

4. Contel ASC proposes to put the expansion satellite, Contelsat-1, into operation by July 1993 and to put the replacement satellite, Contelsat-2, into operation in November 1993. It proposes to provide services on a common carrier basis. Contel ASC estimates that the cost to construct, launch and operate two satellites for one year and to construct one spare satellite is 456 million. It asserts that it and its parent company, Contel Corporation, have the financial resources available to implement the proposed systems.

5. Contel ASC asserts that it is in the public interest to grant its request for both replacement and expansion capacity. The applicant claims that 80 to 90 percent of the transponder capacity on ASC-1 is carrying traffic, and it seeks to maintain continuity of service for these customers when ASC-1 is retired. Contel ASC also asserts that it needs expansion capacity to serve its expanding domestic customer base and increasing customer requirements for services to Alaska, Hawaii, and Puerto Rico.

6. We find, pursuant to Section 309 of the Communications Act of 1934, 47 U.S.C. § 309, that grant of these applications will serve the public interest, convenience and necessity. Upon reviewing the applications, we find that Contel ASC is legally, technically, financially, and otherwise qualified to construct, launch and operate its proposed satellites pursuant to Section 25.391 of the Commission's rules, 47 C.F.R. § 25.391. Contel ASC's request for replacement capacity conforms with Commission policies. In addition, Contel ASC may be granted one additional orbital location in both the 4/6 GHz and 12/14 GHz bands pursuant to Section 25.391(g) of the Commission's rules, 47 C.F.R. § 25.391(g). Issues involving the orbital assignment for Contel ASC's expansion satellite are resolved in the *1988 Orbit Assignment Order* [2] and that discussion will not be repeated here.

7. Accordingly, IT IS ORDERED that Application File Nos. 6025-DSS-P/LA-87, 6026-DSS-P/LA-87, and 6027-DSS-P-87 ARE GRANTED and Contel ASC IS AUTHORIZED to construct three domestic communications fixed-satellites in accordance with the terms, conditions, and technical specifications set forth in the application.

8. IT IS FURTHER ORDERED that Contel ASC IS AUTHORIZED to launch and operate two space stations in the domestic Fixed-Satellite Service in accordance with the *1988 Orbit Assignment Order*, FCC 88-373 (adopted November 17, 1988), as well as the relevant terms and conditions of all previous orders and authorizations concerning the operation of space stations. These requirements include the filing of semi-annual reports on the progress of space station construction and current satellite operational status and transponder loading, as described in *1980 Orbit Assignment Order*, 84 FCC 2d 584, 611-612 (1981) and *1983 Domestic Fixed Satellite Licensing Order*, 54 Rad. Reg. 2d (P&F) 577 (1983) at para: 91.

9. IT IS FURTHER ORDERED that, unless extended by the Commission for good cause shown, this authorization shall become null and void in the event the space station is not constructed, launched, and successfully placed into operation in accordance with the technical parameters and terms and conditions of this authorization by the following dates, as certified in writing to the Commission by the licensee:

	Construction Commenced	Construction Completed	Launched
Contelsat-1	August 1900	February 1993	May 1993
Contelsat-2	December 1990	June 1993	September 1993
Contelsat-3	April 1991	October 1993	ground spare

10. IT IS FURTHER ORDERED that the license term for the space stations is ten years and will begin to run on the date the licensee certifies to the Commission that the satellite has been successfully placed into orbit and the operations fully conform to the terms and conditions of this authorization.

11. IT IS FURTHER ORDERED that Contel ASC, as required by Section 25.202 (c) of the Commission's rules, 47 C.F.R. § 25.202 (c), will prepare the necessary submissions to the International Telecommunication Union (ITU) for advance publication, international coordination and notification of these space stations in accordance with the ITU Radio Regulations and for consultation in accordance with Article XIV of the INTELSAT Agreement within sixty days of the release of this order.

12. IT IS FURTHER ORDERED that the temporary assignment of any orbital location to Contel ASC is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to use the orbit and spectrum. Neither this authorization, nor any right granted by this authorization, shall be transferred, assigned or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commisision that the public interest, convenience and necessity will be served thereby.

13. Contel ASC is afforded thirty days from the date of release of this order and authorization to decline these authorizations as conditioned. Failure to respond within that period will constitute formal acceptance of the authorizations as conditioned.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *See* American Satellite Company, 94 FCC 2d 39 (1983). In 1985, the Commission granted Contel ASC authority to launch one additional hybrid satellite, *see* American Satellite Company, 103 FCC 2d 542 (1985). Contel ASC subsequently relinquished this authorization.

[2] Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, FCC 88-373 (adopted November 17, 1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Applications of

GE AMERICAN COMMUNICATIONS, INC.

File Nos. 6012-DSS-P/LA-87
6013-DSS-P/LA-87

For Authority to Construct, Launch and Operate Space Stations in the Domestic Fixed-Satellite Service

ORDER AND AUTHORIZATION

Adopted: November 17, 1988; Released: December 7, 1988

By the Commission:

1. GE American Communications, Inc. (GE Americom) requests authority to construct, launch and operate a hybrid domestic fixed-satellite operating in both the 4/6 GHz and 12/14 GHz bands.[1] GTE Spacenet Corporation (GTE Spacenet) filed a petition to deny GE Americom's applications and Contel ASC filed comments.[2] For the reasons discussed below, we grant GE Americom's application.

2. GE Americom is a wholly-owned subsidiary of RCA Corporation which in turn is a wholly-owned subsidiary of General Electric Company. GE Americom provides a variety of telecommunications services including video and audio services, commercial channels and data services and service to the U.S. Government. It is currently operating four satellites at 4/6 GHz. [3] In addition, it is authorized to construct, launch and operate three 12/14 GHz satellites and to construct one 12/14 GHz on-ground spare.[4] Two of the 12/14 GHz satellites have been launched and are currently in operation.

3. GE Americom's proposed hybrid satellite -- Satcom H-1 -- will carry sixteen 12/14 GHz transponders, each with a bandwidth of 54 MHz and a nominal output power of 60 watts. The 12/14 GHz section of the satellite will provide three coverage patterns; a beam covering the 48 contiguous United States (CONUS), a west CONUS beam and an east CONUS beam with a maximum effective isotropically radiated power (EIRP) of 50 dBW, 53 dBW and 52 dBW, respectively. The CONUS and east CONUS beams will provide full coverage to Puerto Rico and the Virgin Islands. The 4/6 GHz section of the proposed satellite will carry 24 transponders, each with a bandwidth of 36 MHz and a nominal output power of 10 watts. Coverage will consist of one CONUS beam with a maximum EIRP of 39 dBW. GE Americom estimates that the cost to construct and launch the satellite, and to operate it for one year is 329 million. GE Americom requests the 99^0 West Longitude (W.L.) location for its hybrid satellite, and proposes to provide service on a common carrier basis.

4. We find that, pursuant to Section 309 of the Communications Act, 47 U.S.C. § 309, grant of GE Americom's application will serve the public interest, convenience and necessity. We find GE Americom is legally, technically, financially and otherwise qualified to construct, launch and operate its proposed satellites pursuant to Section 25.391 of the Commission's rules, 47 C.F.R. § 25.391. In accordance with our rule granting one expansion location when existing satellites are essentially filled,[5] we assign GE Americom a fifth 4/6 GHz orbital location and a fourth 12/14 GHz satellite orbital location for its hybrid satellite. Issues involving the orbital assignment for Satcom H-1 are resolved in *1988 Orbit Assignment Order* [6] and that discussion will not be repeated here.

5. Accordingly, IT IS ORDERED that Application File No. 6012-DSS-P/LA-87 IS GRANTED and GE American Communications, Inc. IS AUTHORIZED to construct one domestic communications satellite in accordance with the terms, conditions and technical specifications set forth in its application.

6. IT IS FURTHER ORDERED that Application File No. 6013-DSS-P/LA-87 IS DISMISSED at the applicant's request.

7. IT IS FURTHER ORDERED that GE American Communications, Inc. IS AUTHORIZED to launch and operate one space station in the domestic Fixed-Satellite Service in accordance with the *1988 Orbit Assignment Order*, FCC 88-373 (adopted November 17, 1988), as well as the relevant terms and conditions of all previous orders and authorizations concerning the operation of space stations. These requirements include the filing of semi-annual reports on the progress of space station construction and current satellite operational status and transponder loading, as described in *1980 Orbit Assignment Order*, 84 FCC 2d 584, 611-612 (1981) and *1983 Domestic Fixed Satellite Licensing Order*, 54 Rad. Reg. 2d (P&F) 577 (1983) at para. 91.

8. IT IS FURTHER ORDERED that, unless extended by the Commission for good cause shown, the authorization shall become null and void in the event the space station is not constructed, launched, and successfully placed into operation in accordance with the technical parameters and terms and conditions of this authorization by the following dates:

	Construction Commenced	Construction Completed	Launched
Satcom H-1	November 1989	May 1993	August 1993

9. IT IS FURTHER ORDERED that the license term for the space station is ten years and will begin to run on the date the licensee certifies to the Commission that the satellite has been successfully placed into orbit and the operations fully conform to the terms and conditions of this authorization.

10. IT IS FURTHER ORDERED that GE American Communications, Inc., as required by Section 25.202 (c) of the Commission's rules, 47 C.F.R. § 25.202 (c), will prepare the necessary submissions to the International Telecommunication Union (ITU) for advance publication, international coordination and notification of these space stations in accordance with the ITU Radio Regulations

and for consultation in accordance with Article XIV of the INTELSAT Agreement within sixty days of the release of this order.

11. IT IS FURTHER ORDERED that the temporary assignment of any orbital location to GE American Communications, Inc. is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to use the orbit and spectrum. Neither this authorization, nor any right granted by this authorization, shall be transferred, assigned or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience and necessity will be served thereby.

12. IT IS FURTHER ORDERED that the Petition to Deny filed by GTE Spacenet Corporation IS DENIED.

13. GE American Communications, Inc. is afforded thirty days from the date of release of this order and authorization to decline this authorization as conditioned. Failure to respond within that period will constitute formal acceptance of the authorization as conditioned.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] On February 23, 1988, GE Americom withdrew its application for a single-band 12/14 GHz satellite.

[2] GTE Spacenet and Contel ASC assert that GE Americom's applications for two satellites with 12/14 GHz capacity violates Section 25.391(g) of the Commission's rules, 47 C.F.R. § 25.391(g), which provides that only one additional orbital location in each frequency band may be granted to existing operators. In view of GE Americom's withdrawal of its request for a second additional 12/14 GHz location, we dismiss GTE Spacenet's petition and Contel ASC's comments as moot.

[3] RCA Global Communications, 56 FCC 2d 660 (1975); RCA American Communications, Inc., 75 FCC 2d 531 (1979); RCA American Communications, Inc., 84 FCC 2d 633 (1981); RCA American Communications, Inc. 103 FCC 2d 852 (1985). In 1983, GE Americom was authorized to construct and operate a satellite, then designated Satcom-5. However, that satellite was sold to Alascom, Inc. and is jointly licensed to GE Americom and Alascom for use primarily by Alascom. *See* Alascom, Inc., FCC 82T-25 (released October 25, 1982).

[4] RCA American Communications, Inc., 94 FCC 2d 441 (1983).

[5] 47 C.F.R. § 25.391(g).

[6] Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, FCC 88-373 (adopted November 17, 1988). (*1988 Orbit Assignment Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Applications of

GTE	File Nos. 2760-DSS-MP/PL-87
SPACENET	6018-DSS-P/LA-87
CORPORATION	6019-DSS-P/LA-87
	6020-DSS-P/LA-87
	6021-DSS-P-87

For Authority to Construct, Launch and Operate Space Stations in the Domestic Fixed-Satellite Service and to Modify the Authorization for the GSTAR IV Domestic Fixed-Satellite

ORDER AND AUTHORIZATION

Adopted: November 17, 1988; Released: December 7, 1988

By the Commission:

1. GTE Spacenet Corporation (GTE Spacenet) requests authority to construct three and launch and operate two hybrid domestic fixed-satellites operating in both the 4/6 GHz and 12/14 GHz bands. It also requests authority to construct, launch and operate one 12/14 GHz domestic fixed-satellite. All of these proposed satellites would replace currently operational spacecraft. In addition, GTE Spacenet seeks an additional orbit location for its previously-authorized GSTAR IV domestic fixed-satellite.[1] Home Box Office, Inc. (HBO) filed a petition to deny the GSTAR IV application. Contel ASC and Geostar Corporation (Geostar) filed comments on the GSTAR IV application and the other GTE Spacenet applications. For the reasons discussed below, we grant the applications.

2. GTE Spacenet is a wholly-owned subsidiary of GTE Corporation, a holding company that, through subsidiaries, engages in various telecommunications activities. GTE Spacenet currently operates three hybrid Spacenet satellites and two 12/14 GHz GSTAR satellites. It also holds authorizations for two other GSTAR satellites.[2]

3. GTE Spacenet seeks authority to replace two hybrid satellites, Spacenet I at 120^0 W.L. and Spacenet II at 69^0 W.L. These satellites have been operating since shortly after launch in May 1984 and November 1984, respectively. GTE Spacenet proposes to launch both replacement satellites in 1993 and requests that they be assigned to the 120^0 W.L. and 69^0 W.L. orbital locations. The third hybrid satellite that GTE Spacenet seeks to construct will be an on-ground spare.

4. The Spacenet satellites will have 24 transponders at 4/6 GHz, and each transponder will have a 36 MHz bandwidth and 16 watts nominal output power. At 12/14 GHz, the satellites will have 22 transponders with 50 watts nominal output power and variable bandwidths: eight at 27 MHz, four at 36 MHz, and ten at 54 MHz. For both frequency bands, coverage areas include all 50 states, Puerto Rico and the U.S. Virgin Islands. The edge of coverage effective isotropically radiated power (EIRP) values for the 48 contiguous United States (CONUS), Puerto Rico/Virgin Islands and Hawaii are 35 dBW, 28.8 dBW and 30 dBW, respectively, for the 4/6 GHz band and 40.8 dBW, 37.8 dBW and 41.8 dBW, respectively, for the 12/14 GHz band.

5. GTE Spacenet also seeks authority to replace one 12/14 GHz satellite, GSTAR I, at 103^0 W.L. GSTAR I has been operating since shortly after launch in March 1986. GTE Spacenet proposes to launch a replacement 12/14 GHz satellite in early 1994 [3] and requests that it be assigned to the 103^0 W.L. orbital location.

6. The GSTAR satellite will have 24 transponders, sixteen with a 27 MHz bandwidth and eight with a 54 MHz bandwidth, and 70 watts nominal output power. Coverage areas include the 50 states, Puerto Rico and U.S. Virgin Islands. The edge of coverage EIRP values for CONUS, Puerto Rico/Virgin Islands and Hawaii are 43.8 dBW, 40.8 dBW and 42.8 dBW, respectively. The EIRP value for Alaska coverage is 43.3 dBW.

7. GTE Spacenet asserts that grant of authority for the replacement satellites would be in the public interest because it would enable GTE Spacenet to continue to provide service to its customers. Further, GTE Spacenet anticipates that its current in-orbit satellites will operate at or near capacity until they are replaced in 1993.

8. GTE Spacenet requests that it be allowed to provide some service on each of these proposed replacement satellites on a noncommon carrier basis. The Commission previously authorized GTE Spacenet to offer up to 80 transponders, but in no event more than 59 percent of its total transponder capacity, on a noncommon carrier basis.[4] GTE Spacenet seeks to transfer this authority from its currently authorized satellites to the replacement satellites.

9. GTE Spacenet estimates that the cost to construct, launch and operate for one year the three satellites and to construct one spare satellite is approximately839.73 million. It asserts that it and its parent company, GTE Corporation, have the financial resources available to implement the proposed systems.

10. Contel ASC expresses concern that the 16 watt solid state power amplifier (SSPAs) proposed for the 4/6 GHz band operations on the Spacenet satellites will cause undue interference into single channel per carrier (SCPC) traffic on adjacent satellites. Contel ASC suggests that GTE Spacenet be required to coordinate these proposed operations with adjacent satellite operators and, if interference problems cannot be resolved, GTE Spacenet should be required to reduce the power levels of the interfering transponder. In response, GTE Spacenet claims that its proposed operations are within the power-flux density limits set by Section 25.208 of the Commission's rules, 47 C.F.R. § 25.208. Further, GTE Spacenet notes that its current Spacenet satellites use 16 watt transponders and that it has been able to coordinate those operations with other satellite operators^0 systems successfully, both domestic and foreign.

11. In addition to its requests to construct and launch replacement satellites, GTE Spacenet requests an additional orbital location for its previously authorized GSTAR IV satellite, which is currently required to be co-located with its GSTAR III satellite. In August 1987, we granted GTE Spacenet authority to modify the GSTAR IV construction permit to add a transmit/receive payload

in the Radiodetermination Satellite Service (RDSS) for the use of its customer, Geostar Corporation.[5] GTE Spacenet requests that GSTAR IV be assigned to 99° W.L. because the RDSS payload will be able to operate at maximum capacity from this location[6] and because it will enable GTE Spacenet to provide back-up capacity for its GSTAR satellites operating at 103° W.L. and 105° W.L.

12. HBO has petitioned to deny the GSTAR IV modification application. HBO argues that including the RDSS payload, which operates in the 1.6 GHz and 2.5 GHz bands, on GSTAR IV reduces the 12/14 GHz capacity significantly and thus violates Commission policies on efficient use of orbit-spectrum resources. HBO also argues that GTE Spacenet should be required to seek a new launch authorization and to demonstrate the need for additional 12/14 GHz capacity.[7]

13. We find, pursuant to Section 309 of the Communications Act of 1934, 47 U.S.C. § 309, that grant of these applications will serve the public interest, convenience and necessity. We find that GTE Spacenet is legally and financially qualified to construct, launch and operate its proposed satellites pursuant to Section 25.391 of the Commission's rules, 47 C.F.R. § 25.391. With respect to the replacement satellites, we find no merit to Contel ASC's concerns regarding the interference potential of these satellites since the SSPA power levels are the same for both proposed and operational GTE Spacenet satellites. Furthermore, GTE Spacenet asserts that it has been able to coordinate their present operations with other satellite operators. We also find no basis for concluding at this time that GTE Spacenet will not cooperate as necessary in coordinating its proposed operations to avoid harmful interference to adjacent satellite operators, and thus we will not condition these authorizations as requested by Contel ASC. In addition, we grant GTE Spacenet's request for noncommon carrier sales authority. No oppositions to this request were filed, and thus we find that granting an extension of the previously granted noncommon carrier authority to the replacement satellites is in the public interest. Thus, we grant GTE Spacenet authority to construct four and launch three replacement satellites as specified in its applications.

14. With respect to a new orbital location for GSTAR IV, Geostar has informed the Commission that it no longer intends to place a transmit/receive RDSS package on GSTAR IV.[8] Thus, HBO's concerns about the impact the package will have on GSTAR IV's 12/14 GHz capacity have become moot.[9] In addition, we find that GTE Spacenet may be assigned an additional orbital location for GSTAR IV pursuant to the Commission's rules for the assignment of additional orbital locations. Under Section 25.391(g) of the Commission's rules, 47 C.F.R. § 25.391(g), a qualified applicant may be assigned one additional orbital location in a frequency band if its in-orbit satellites are essentially filled and it has no more than two unused orbital locations for previously authorized but unlaunched satellites in that band. GTE Spacenet anticipates that the current in-orbit satellites that operate in the 12/14 GHz band will operate at or near capacity for at least the next 4 to 5 years.[10] Further, it has no unused orbital locations in the 12/14 GHz band. Thus, we will grant GTE Spacenet an additional orbital location at 12/14 GHz. We assign GSTAR IV to an orbital location in accordance with fixed-satellite service policies and requirements, taking into account the overall needs of all applicants in the fixed-satellite processing group.[11]

15. Accordingly, IT IS ORDERED that Application File Nos. 2760-DSS-MP/ML-87, 6018-DSS-P/LA-87, 6019-DSS-P/LA-87, 6020-DSS-P/LA-87 and 6021-DSS-P-87 ARE GRANTED and GTE Spacenet Corporation IS AUTHORIZED to construct four domestic communications fixed-satellites in accordance with the terms, conditions, and technical specifications set forth in the application.

16. IT IS FURTHER ORDERED that GTE Spacenet Corporation IS AUTHORIZED to launch and operate four space stations in the domestic Fixed-Satellite Service in accordance with the *1988 Orbit Assignment Order*, FCC 88-373 (November 17, 1988), as well as the relevant terms and conditions of all previous orders and authorizations concerning the operation of space stations. These requirements include the filing of semi-annual reports on the progress of space station construction and current satellite operational status and transponder loading, as described in *1980 Orbit Assignment Order*, 84 FCC 2d 584, 611-612 (1981) and *1983 Domestic Fixed Satellite Licensing Order*, 54 Rad. Reg. 2d (P&F) 577 (1983) at para. 91.

17. IT IS FURTHER ORDERED that, unless extended by the Commission for good cause shown, these authorizations shall become null and void in the event the space stations are not constructed, launched, and successfully placed into operation in accordance with the technical parameters and terms and conditions of these authorizations by the following dates, as certified in writing to the Commission by the licensee:

	Construction Commenced	Construction Completed	Launched
GSTAR IV	* * *	August 1989	February 1990
Spacenet 1R	March 1990	March 1993	May 1993
Spacenet IIR	May 1990	May 1993	September 1993
Spacenet IIIR	January 1991	January 1994	spare
GSTAR IR	March 1991	March 1994	June 1994

18. IT IS FURTHER ORDERED that the license term for the space stations is ten years and will begin to run on the date the licensee certifies to the Commission that the satellite has been successfully placed into orbit and the operations fully conform to the terms and conditions of this authorization.

19. IT IS FURTHER ORDERED that GTE Spacenet Corporation, as required by Section 25.202 (c) of the Commission's rules, 47 C.F.R. § 25.202 (c), will prepare the necessary submissions to the International Telecommunication Union (ITU) for advance publication, international coordination and notification of these space stations in accordance with the ITU Radio Regulations and for consultation in accordance with Article XIV of the INTELSAT Agreement within sixty days of the release of this order.

20. IT IS FURTHER ORDERED that the temporary assignment of any orbital location to GTE Spacenet Corporation is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to use the orbit and spectrum. Neither this authorization, nor any right granted by this authorization, shall be transferred, assigned or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commisision that the public interest, convenience and necessity will be served thereby.

21. IT IS FURTHER ORDERED that the petition to deny filed by Home Box Office, Inc. IS DENIED.

22. GTE Spacenet Corporation is afforded thirty days from the date of release of this order and authorization to decline these authorizations as conditioned. Failure to respond within that period will constitute formal acceptance of the authorizations as conditioned.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The GSTAR IV satellite was initially authorized for construction as a 12/14 GHz on-ground spare. *See* GTE Satellite Corporation, 84 FCC 2d 562 (1981). It was later authorized for launch and as partial replacement capacity for the Spacenet satellite involved in a launch failure in September 1985. *See* GTE Spacenet Corporation, 2 FCC Rcd 55 (1987). GSTAR IV was assigned to the 136^0 W.L. location that had been assigned to a Spacenet satellite and to a co-located GSTAR satellite.

[2] The currently operational hybrid satellites are Spacenet I at 120^0 West Longitude (W.L.), Spacenet II at 69^0 W.L. and Spacenet III at 87^0 W.L. The currently operational 12/14 GHz satellites are GSTAR I at 103^0 W.L. and GSTAR II at 105^0 W.L. GSTAR III was launched in September 1988 but is not yet operational, and GSTAR IV is under construction.

[3] It is Commission policy not to grant applications for satellite facilities more than five years in advance of launch. *See* 1985 Domestic Fixed-Satellite Licensing Order, 50 Fed. Reg. 36071 (September 5, 1985). For the processing group acted upon today, all proposed satellites should be launched by 1993. However, because we did not specify a specific launch cut-off date in the Public Notice inviting applications to be considered in this processing group (*see* Public Notice, DS-635 (June 10, 1987)) and because GTE Spacenet's proposed launch of GSTAR IR is only six months after the cut-off period, we will act on its application at this time.

[4] *See* Letter of Chief, Domestic Facilities Division, Common Carrier Bureau to Counsel, GTE Spacenet Corporation (File No. 1139-DSS-MP/ML-86) (March 31, 1987). The Bureau authorized GTE Spacenet to offer on a noncommon carrier basis up to 80 transponders on its then authorized satellites so long as it did not exceed 59 percent of its total transponder capacity system-wide. At the time of grant, GTE Spacenet had 136 authorized transponders, including those on the Spacenet III, GSTAR III and GSTAR IV satellites that had not been launched. GTE Spacenet now seeks to transfer this authority to the replacement satellites being considered here; no additional authority for noncommon carrier offerings is requested.

[5] *See* GTE Spacenet Corporation, 2 FCC Rcd 5312 (1987).

[6] Optimal operation of the RDSS payload requires its location at 99^0 W.L., which is near the center of CONUS and equidistant from Geostar's other space segment facilities. Geostar filed comments in support of GTE Spacenet's requested orbital location based on the operational needs of the RDSS payload.

[7] HBO also claims that GTE Spacenet has misled the Commission concerning the possible inclusion of a mobile satellite service (MSS) payload on GSTAR IV in addition to the RDSS payload, and thus the GSTAR IV application raises a substantial and material question of fact that requires designating the application for hearing. We find that the record does not suggest that GTE Spacenet intends to include an MSS package on GSTAR IV. If GTE Spacenet decides to incorporate an MSS package on this satellite, an application must be filed. We will consider any issues raised by this application, including possible reassignment of GSTAR IV, at that time. Given this finding, we will not designate the GSTAR IV application for hearing.

[8] *See* Application for Digital Land Mobile Satellite System filed by Geostar on June 16, 1988.

[9] In any event, we recognize that when the Common Carrier Bureau granted GTE Spacenet authority to add the RDSS payload to GSTAR IV, it found no significant adverse impact on the fixed-satellite service in the 12/14 GHz band. *See* GTE Spacenet Corporation, *supra* note 5, at para. 11.

[10] The hybrid Spacenet III satellite has only recently been launched and thus has not had the opportunity to achieve industry average fill.

[11] *See* Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, FCC 88-373 (adopted November 17, 1988) (*1988 Orbit Assignment Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Applications of

HUGHES	File Nos. 6015-DSS-P/LA-87
COMMUNICATIONS	6016-DSS-P/LA-87
GALAXY, INC.	6017-DSS-P/LA-87
	2284-DSS-P/LA-88
	2285-DSS-P/LA-88
	2291-DSS-P/LA-88
	2292-DSS-P/LA-88
	2293-DSS-P/LA-88

For Authority to Construct, Launch and Operate Space Stations in the Domestic Fixed-Satellite Service

ORDER AND AUTHORIZATION

Adopted: November 17, 1988; Released: December 7, 1988

By the Commission:

1. Hughes Communications Galaxy, Inc. (Hughes) requests authority to construct, launch and operate its fifth domestic fixed-satellite in the 4/6 GHz frequency bands and two satellites in the 12/14 GHz frequency bands. American Telephone and Telegraph Company (AT&T) and GTE Spacenet Corporation (GTE Spacenet) filed petitions to deny, and American Satellite Company d/b/a Contel ASC (Contel ASC) filed comments on this request. Hughes also requests authority to construct and launch satellites to replace its Galaxy I, II and III satellites. No comments were filed with respect to this application. Finally, Western Union Corporation (Western Union) has applied to replace its Westar IV and V satellites. These satellites, however, were recently authorized to be assigned to Hughes and Hughes now requests that it be considered the applicant for the Westar replacements.[1] GTE Spacenet Corporation (GTE), The Associated Press (AP), and Contel ASC have filed comments with respect to these replacement applications. For the reasons discussed below, we grant the applications.

2. Hughes is a wholly-owned subsidiary of Hughes Communications, Inc. which is a wholly-owned subsidiary of Hughes Aircraft Company. Hughes Aircraft Company is a wholly-owned subsidiary of GM Hughes Electronics Corporation which itself is a wholly-owned subsidiary of General Motors Corporation. Hughes is currently authorized to operate seven 4/6 GHz satellites, six of which are currently in-orbit.[2]

New Satellite Applications

3. Hughes's proposed expansion 4/6 GHz satellite -- Galaxy 5 -- will carry 24 transponders, each with a bandwidth of 36 MHz and a nominal transmitter output power of 9 watts. The satellite will provide coverage to the 48 contiguous states (CONUS), Alaska, Hawaii, Puerto Rico and the Virgin Islands at a maximum effective isotropically radiated power (EIRP) of 38.5 dBW. Transborder services may also be provided consistent with Commission policy. Hughes requests the 101^0 West Longitude (W.L.) orbital location, where it proposes to co-locate Galaxy 5 with one of its proposed 12/14 GHz satellites. It estimates the cost to construct and launch this satellite and to operate it for one year is124 million. Hughes proposes to sell all of the transponders on Galaxy 5 on a noncommon carrier basis with purchasers retaining the right to offer common carrier services.

4. Hughes's proposed 12/14 GHz satellites will each carry 24 transponders, eight with a bandwidth of 54 MHz and 16 with a bandwidth of 26 MHz and a nominal output power of 60 watts. The satellites will provide three coverage patterns; a CONUS beam, a west CONUS beam and an east CONUS beam with maximum EIRPs of 50.6 dBW, 55.2 dBW and 53.3 dBW, respectively. Hughes requests the 101^0 W.L. and 89^0 W.L. orbital locations. It estimates the cost to construct and launch the 12/14 GHz satellites and to operate them for one year is422 million. Finally, Hughes proposes to sell all of the transponders on these satellites on a noncommon carrier basis with purchasers retaining the right to offer common carrier services.

5. AT&T and GTE Spacenet, in their Petitions to Deny, assert that the Hughes application for two 12/14 GHz satellites violates Section 25.391(g) of the Commission's rules, 47 C.F.R. § 25.391(g), which states that each qualified applicant may be assigned no more than one additional orbital location beyond its current authorizations in each frequency band in which it is authorized to operate. The parties argue that Hughes's 1985 authorizations to operate two 12/14 GHz satellites preclude Hughes from receiving more than one additional 12/14 GHz authorization at this time. [3]

6. We find that, pursuant to Section 309 of the Communications Act, 47 U.S.C. § 309, grant of these applications will serve the public interest, convenience, and necessity. Hughes is legally, technically, financially and otherwise qualified pursuant to Section 25.391 of the Commission's rules, 47 C.F.R. § 25.391. In addition, the concerns raised by AT&T and GTE Spacenet regarding the number of orbital assignments at 12/14 GHz have become moot. Subsequent to its application for two additional 12/14 GHz satellites, Hughes relinquished its 1985 12/14 GHz authorizations. Consequently, Hughes has no current authorizations for 12/14 GHz satellites. Therefore, Hughes is a new entrant in the 12/14 GHz frequency bands and may be assigned two initial orbital locations in this band pursuant to Section 25.391(f) of the Commission's rules, 47 C.F.R. § 25.391(f). In accordance with our rule of granting one expansion location when existing satellites are essentially filled, 47 C.F.R. § 25.391(g), we will also grant Hughes a fifth 4/6 GHz orbital location.

7. Other issues involving the orbital locations for Hughes's satellites are resolved in the *1988 Orbit Assignment Order*,[4] and that discussion will not be repeated here. Finally, based on Hughes's representations, we find that its proposed transponder transactions are noncommon carrier in nature and are otherwise consistent with the Commission's transponder sales policies.[5]

Galaxy Replacement Satellite Applications

8. In January 1988, Hughes filed applications to construct, launch and operate three satellites in the 4/6 GHz frequency bands that would replace its existing Galaxy I, Galaxy II and Galaxy III satellites at the end of their useful lives. Hughes proposes to operate these satellites from the same orbital locations as currently occupied by its present satellites, namely 134^0 W.L., 74^0 W.L. and 93^0 W.L. These applications are unopposed.

9. Hughes's proposed replacement satellites would each carry 24 transponders, each with a bandwidth of 36 MHz and an output power of 16 watts. The satellites would provide services to the 48 contiguous states, Alaska, Hawaii, and Puerto Rico/Virgin Islands at a maximum EIRP of 38.0 dBW. Authority to provide transborder services may be applied for at a later date. Hughes estimates that the total cost of the space and ground segments of its replacement system would be412 million, with operational costs during the first years of launch averaging about15 million per year. Hughes proposes to sell all transponders on its replacement satellites on a noncommon carrier basis.

10. Pursuant to Section 309 of the Communications Act, 47 U.S.C. § 309, we find that grant of these applications for replacement facilities will serve the public interest, convenience and necessity. Hughes is legally, technically, financially and otherwise qualified to construct, launch and operate its proposed Galaxy replacement satellites pursuant to Section 25.391 of the Commission's rules, 47 C.F.R. § 25.391. In addition, because Hughes is proposing to locate these facilities in the same locations as its currently operating satellites, no new orbital locations are required to accommodate its request.[6] Action here is consistent with out traditional policy to grant routinely uncontested applications for replacement satellites at the same location as retired satellites, as well as with our goal to provide continuity of service to both the operators and their customers. Finally, we find that Hughes's proposed transponder transactions are consistent with the Commission's transponder sales policies.[7]

Westar Replacement Satellite Applications

11. Western Union Corporation (Western Union) has requested authority to construct, launch and operate two 4/6 GHz satellites to replace Westar IV and Westar V at the end of their useful lives. At the time that these applications were filed, Western Union's request to assign its satellite licenses to Hughes was pending and Western Union indicated that its replacement applications were filed as an "accommodation" to Hughes in anticipation of the grant of the assignment. Because the assignment has been approved,[8] we will authorize Hughes to construct, launch and operate replacements for Westar IV and Westar V conditioned upon the consummation of the Western Union/Hughes assignment.[9]

12. The proposed Westar replacements would each carry 24 transponders, each with a bandwidth of 36 MHz and an output power of 10 watts. The satellites will provide service to the 48 contiguous states, Alaska, Hawaii and Puerto Rico/Virgin Islands at a maximum EIRP of 37.0 dBW. Transborder services may be provided consistent with Commission policy. The applicants request the same locations currently occupied by its present satellites, namely 99^0 W.L. and 122.5^0 W.L., although Westar V is currently assigned to 124^0 W.L. The estimated cost of constructing and launching replacements for Westar IV and Westar V is approximately300 million and the operating costs for the years immediately following launch are between5 and8 million. Western Union, on behalf of Hughes, has requested authority to market all of the transponders on a noncommon carrier basis.

13. GTE and AP express concern about replacing Westar V at 122.5^0 W.L. rather than at its assigned location because of interference potential between Westar VR and Spacenet I. Spacenet I is located at 120^0 W.L. and is co-polarized with Westar VR. In reply comments, Hughes/Western Union states that it would be amenable to launching Westar VR into either 122.5^0 W.L. or 124^0 W.L. We assign Westar VR to the same location as that assigned to Westar V and Hughes will be expected to launch the satellite into that location.[10] Thus, GTE's and AP's concerns are alleviated.

14. The objections raised by Contel ASC are the same as those raised in its application to reassign ASC-2 to the 99^0 W.L. location currently occupied by Westar IV. By separate order today, we deny Contel ASC's request[11] and that order disposes of the issues Contel ASC raises in this proceeding. We will not repeat that discussion here.

15. Hughes meets all qualifications to be a satellite licensee and grant of these applications to replace the Westar satellites is in the public interest.[12] In addition, the request to sell all transponders on these satellites is consistent with the Commission's transponder sales policies.[13]

16. Accordingly, IT IS ORDERED that Application File Nos. 6015-DSS-P/LA-87, 6016-DSS-P/LA-87, 6017-DSS-P/LA-87, 2284-DSS-P/LA-88, 2285-DSS-P/LA-88, 2291-DSS-P/LA-88, 2292-DSS-P/LA-88, and 2293-DSS-P/LA-88, ARE GRANTED and Hughes Communications Galaxy, Inc. IS AUTHORIZED to construct eight domestic communications satellites in accordance with the terms, conditions and technical specifications set forth in its applications.

17. IT IS FURTHER ORDERED that Hughes Communications Galaxy, Inc. IS AUTHORIZED to launch and operate eight space stations in the domestic fixed-satellite service in accordance with the *1988 Orbit Assignment Order*, FCC 88-373 (November 17, 1988), as well as the relevant terms and conditions of all previous orders and authorizations concerning the operation of space stations. These requirements include the filing of semi-annual reports on the progress of space station construction and current satellite operational status and transponder loading, as described in *1980 Orbit Assignment Order*, 84 FCC 2d 584, 611-612 (1981) and *1983 Domestic Fixed Satellite Licensing Order*, 54 Rad. Reg. 2d (P&F) 577 (1983) at para. 91.

18. IT IS FURTHER ORDERED that unless extended by the Commission for good cause shown, the authorizations to construct and launch Westar IVR and Westar VR will become null and void in the event the assignment of the Westar system licenses from Western Union Corporation to Hughes Communications Galaxy, Inc. is not consummated by January 31, 1989.

19. IT IS FURTHER ORDERED that unless extended by the Commission for good cause shown, each of the authorizations shall become null and void in the event the space station is not constructed, launched, and successfully placed into operation in accordance with the technical parameters and terms and conditions of these authorizations by the following dates:

	Construction Commenced	Construction Completed	Launched
Galaxy 5	April 1989	April 1993	July 1993
Galaxy A	April 1989	April 1993	July 1993
Galaxy B	April 1989	October 1993	January 1994
Galaxy 1R	December 1989	December 1992	March 1993
Galaxy 2R	December 1990	December 1993	March 1994
Galaxy 3R	December 1990	December 1993	March 1994
Westar IV R	February 1989	March 1991	May 1991
Westar V R	February 1989	March 1991	May 1991

20. IT IS FURTHER ORDERED that the license term for the space stations is ten years and will begin to run on the date the licensee certifies to the Commission that the satellite has been successfully placed into orbit and the operations fully conform to the terms and conditions of this authorization.

21. IT IS FURTHER ORDERED that Hughes Communications Galaxy, Inc. IS AUTHORIZED to sell 24 transponders on its fifth 4/6 GHz band satellite, 48 transponders on its two 12/14 GHz band satellites, 72 transponders on its 4/6 GHz band replacement satellites and 48 transponders on the Westar replacement satellites, authorized today, in accordance with Commission policies articulated in *Domestic Fixed - Satellite Transponder Sales*, 90 FCC 2d 1238 (1982), *aff'd sub nom. Wold Communications, Inc. v. FCC*, 735 F.2d 1465 (D.C. Cir. 1984).

22. IT IS FURTHER ORDERED that Hughes Communications Galaxy, Inc. as required by Section 25.202(c) of the Commission's rules, 47 C.F.R. § 25.202(c), will prepare the necessary submissions to the International Telecommunication Union (ITU) for advance publication, international coordination and notification of these space stations in accordance with the ITU Radio Regulations and for consultation in accordance with Article XIV of the INTELSAT Agreement within sixty days of the release of this order.

23. IT IS FURTHER ORDERED that the temporary assignment of any orbital location to Hughes Communications Galaxy, Inc. is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to use the orbit and spectrum. Neither this authorization, nor any right granted by this authorization, shall be transferred, assigned or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commisision that the public interest, convenience and necessity will be served thereby.

24. IT IS FURTHER ORDERED that the Petitions to Deny filed by American Telephone and Telegraph Company, GTE Spacenet Corporation and American Satellite Company d/b/a Contel ASC ARE DENIED.

25. Hughes Communications Galaxy, Inc. is afforded thirty days from the date of release of this order and authorization to decline this authorization as conditioned. Failure to respond within that period will constitute formal acceptance of the authorization as conditioned.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Western Union Corporation and Hughes Communications Galaxy, Inc.'s Application for Consent to Assignment of Licenses, DA 88-1802 (adopted November 16, 1988) (hereinafter Western Union/Hughes Assignment Order). *See* letter to Secretary, Federal Communications Commission from Hughes Communications Galaxy, Inc. (October 27, 1988) stating that Hughes will prosecute the applications of Westar IVR and Westar VR in its own name after the assignment from Western Union is approved and consummated.

[2] This includes the three in-orbit Westar satellites and one authorized but unlaunched Westar replacement satellite recently authorized to be assigned to Hughes from Western Union. Western Union/Hughes Assignment Order, *supra* note 1. *See also* Hughes Communications Galaxy, Inc., 103 FCC 2d 663 (1985); 94 FCC 2d 271 (1983); 84 FCC 2d 578 (1981) (authorizing Hughes's Galaxy satellites).

[3] In 1985, Hughes was granted authority to construct, launch and operate two 12/14 GHz satellites. *See* Hughes Communications Galaxy, Inc., 103 FCC 2d 663 (1985).

[4] Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, FCC 88-373 (adopted November 17, 1988).

[5] Domestic Fixed-Satellite Service Transponder Sales, 90 FCC 2d 1238 (1982), *aff'd sum nom.* Wold Communications, Inc. v. FCC, 735 F.2d 1564 (D.C. Cir. 1984). *See also* Martin Marietta Communications Systems, Inc., FCC 86-282 (June 10, 1986).

[6] In our *1988 Orbit Assignment Order*, *supra* note 4, at para. 6, we have made an adjustment to the assignment for Galaxy I in order to reflect the recent trilateral arrangement with Canada and Mexico. This will be reflected in the location assigned to Galaxy I's replacement. In addition, although Galaxy III is presently operating at 93.5^0 W.L., its assigned location is 95^0 W.L. and we therefore assign its replacement to the latter location.

[7] *See* Western Union/Hughes Assignment Order, *supra* note 1. *See also* Domestic Fixed-Satellite Service - Transponder Sales and Martin Marietta Communications Systems, Inc., *supra* note 5.

[8] Western Union/Hughes Assignment Order, *id.*

[9] *See* letter to Secretary, Federal Communications Commission from Hughes Communications Galaxy, Inc., *supra* note 1.

[10] We are assigning Westar V and VR to 125^0 W.L. instead of 124^0 W.L. in order to fulfill international agreements. *See supra* note 6.

[11] American Satellite Company, FCC 88-372 (adopted November 17, 1988).

[12] *See supra* para. 10.

[13] *See supra* note 5.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Applications of

NATIONAL EXCHANGE SATELLITE, INC.	File Nos. 6022-DSS-P/LA-87 6023-DSS-P/LA-87 6024-DSS-P-87

For Authority to Construct, Launch and Operate Space Stations in the Domestic Fixed-Satellite Service

ORDER AND AUTHORIZATION

Adopted: November 17, 1988; Released: December 7, 1988

By the Commission:

1. National Exchange Satellite, Inc. (NEXSAT) requests authority to construct, launch and operate two hybrid 4/6 GHz and 12/14 GHz domestic fixed-satellites and to construct a third satellite as an on-ground spare. No oppositions were filed against NEXSAT's application, although GTE Spacenet Corporation (GTE Spacenet), Contel ASC and American Telephone and Telegraph Company (AT&T) raised some general concerns regarding the interference potential of NEXSAT's proposed system. For the reasons discussed below, we grant NEXSAT's applications.

2. NEXSAT is a corporation 60% owned by Burlington Northern, Inc. (BNI).[1] Neither NEXSAT nor BNI holds any space station licenses. NEXSAT's proposed "Spotnet" system will consist of two in-orbit hybrid satellites. At 4/6 GHz, each satellite will carry 24 transponders, each with a bandwidth of 36 MHz and a nominal output power of 9 watts. The 48 contiguous United States (CONUS) will be covered using CONUS-wide beams. Spot beams will be used to provide coverage to southern Alaska, Hawaii, Puerto Rico, and the U.S. Virgin Islands. The maximum effective isotropically radiated power (EIRP) at 4/6 GHz is 34 dBW. At 12/14 GHz, NEXSAT states that the concept of "transponders" is inappropriate because its system will handle uplink and downlink processes separately.[2] Each satellite will support 18 distinct coverage patterns – nine "spots" covering eastern and western urban areas and nine one-fifth CONUS "beams" covering areas with lower population density. The "spots" will have a bandwidth of 250 MHz and a maximum EIRP of 63 dBW. The beams will have a bandwidth of 167 MHz and a maximum EIRP of 61 dBW. NEXSAT requests the 101^0 W.L. and 93^0 W.L. orbital locations for its Spotnet satellites, which will provide services on a common carrier basis. [3] NEXSAT estimates that the cost to construct and launch its system and operate it for one year is563.2 million. NEXSAT asserts that BNI, which has assets in excess of1 billion, has committed to NEXSAT all necessary funds.

3. We find, pursuant to Section 309 of the Communications Act, 47 U.S.C. § 309, that grant of NEXSAT's applications will serve the public interest, convenience, and necessity. We find that NEXSAT is financially qualified to construct and launch the Spotnet system pursuant to Section 25.391(d) of the Commission's rules.[4] NEXSAT's 60% owner, BNI, has current assets substantially in excess of that required to cover the cost of NEXSAT's system and has agreed to commit all required funds.[5]

4. We also find that NEXSAT's satellites meet the Commission's technical standards. The hybrid satellites employ full frequency reuse as required by *Reduced Orbital Spacing*.[6] While several satellite licensees are concerned about the interference potential of NEXSAT's high power density single channel per carrier (SCPC) transmissions, and suggest that NEXSAT modify its EIRP densities to conform with those employed by other applicants,[7] we encourage the use of state-of-the-art technology and will authorize its use where the higher power densities can be coordinated with adjacent operators.[8] To this end, we authorize NEXSAT's satellites as proposed in its application, and assign the Spotnet satellites to the high power density segment of the orbital arc.[9] As discussed in detail in the *1988 Orbit Assignment Order*, we will entertain a request by NEXSAT, as a new entrant, to be reassigned to locations outside the high power density arc that are capable of providing 50-state coverage if it can successfully coordinate its operations with adjacent satellite operators.[10]

5. Finally, because NEXSAT is a new entrant in both the 4/6 GHz and 12/14 GHz frequency bands, we award it two initial locations in each band to operate its hybrid satellites.[11] In addition, we grant NEXSAT a construction permit for an on-ground spare.

6. Accordingly, IT IS ORDERED that Application File Nos. 6022-DSS-P/LA-87, 6023-DSS-P/LA-87 and 6024-DSS-P-87 ARE GRANTED and National Exchange Satellite, Inc. IS AUTHORIZED to construct three domestic communications satellites in accordance with the technical specifications set forth in its applications.

7. IT IS FURTHER ORDERED that National Exchange Satellite, Inc. IS AUTHORIZED to launch and operate two space stations in the domestic Fixed-Satellite Service in accordance with the *1988 Orbit Assignment Order*, FCC 88-373 (November 17, 1988), as well as the relevant terms and conditions of all previous orders and authorizations concerning the operation of space stations. These requirements include the filing of semi-annual reports on the progress of space station construction and current satellite operational status and transponder loading, as described in *1980 Orbit Assignment Order*, 84 FCC 2d 584, 611-612 (1981) and *1983 Domestic Fixed Satellite Licensing Order*, 54 Rad. Reg. 2d (P&F) 577 (1983) at para. 91.

8. IT IS FURTHER ORDERED that unless extended by the Commission for good cause shown, each of the authorizations shall become null and void in the event the space station is not constructed, launched, and successfully placed into operation in accordance with the technical parameters and terms and conditions of these authorizations by the following dates:

	Construction Commenced	Construction Completed	Launched
Spotnet 1	August 1989	January 1993	March 1993
Spotnet 2	July 1990	July 1993	September 1993
Spare	January 1991	January 1994	ground spare

9. IT IS FURTHER ORDERED that the license term for the space stations is ten years and will begin to run on the date the licensee certifies to the Commission that the satellite has been successfully placed into orbit and the operations fully conform to the terms and conditions of this authorization.

10. IT IS FURTHER ORDERED that National Exchange Satellite, Inc. as required by Section 25.202(c) of the Commission's rules, 47 C.F.R. § 25.202(c), will prepare the necessary submissions to the International Telecommunication Union (ITU) for advance publication, international coordination and notification of these space stations in accordance with the ITU Radio Regulations and for consultation in accordance with Article XIV of the INTELSAT agreement within sixty days of the release of this order.

11. IT IS FURTHER ORDERED that the temporary assignment of any orbital location to National Exchange Satellite, Inc. is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to use the orbit and spectrum. Neither this authorization, nor any right granted by this authorization, shall be transferred, assigned or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commisision that the public interest, convenience and necessity will be served thereby.

12. National Exchange Satellite, Inc. is afforded thirty days from the date of release of this order and authorization to decline this authorization as conditioned. Failure to respond within that period will constitute formal acceptance of the authorization as conditioned.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The applications were originally filed by National Exchange, Inc. (NEX), which is 90% owned by BNI. NEX subsequently filed a minor amendment to its application, changing the applicant from NEX to NEXSAT.

[2] NEXSAT asserts that based on total reusable frequency, Spotnet's capacity corresponds to the equivalent of 90 transponders.

[3] NEXSAT states that these locations are needed to assure the "proper workings" of the spacecraft and to enable it to implement an understanding it has reached with the American Mobile Satellite Consortium (AMSC) that would allow mobile satellite feeder link operations to be provided via a mobile satellite colocated with a NEXSAT satellite. *See* Letter from Counsel, NEXSAT to Secretary, FCC (September 9, 1988).

[4] 47 C.F.R. § 25.391(d).

[5] *See* Letters from Gerald Grinstein, Vice Chairman, Burlington Northern, Inc. to Clay T. Whitehead (June 29, 1988 and August 20, 1987).

[6] Licensing of Space Stations in the Domestic Fixed-Satellite Service, 54 Rad. Reg. 2d (P&F) 577, 589 (1983).

[7] *See* GTE Spacenet Comments at 11; Contel ASC Reply Comments at 4; AT&T Reply Comments at 16.

[8] *See, e.g.*, RCA American Communications, Inc., FCC 88-359 (adopted November 3, 1988) (establishing a high power density orbital arc segment to accommodate high power density satellites that could not be easily coordinated with lower power density satellites.)

[9] Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, FCC 88-373 (adopted November 17, 1988) (*1988 Orbit Assignment Order*).

[10] *See id.*, at n. 37.

[11] *See* 47 C.F.R. § 25.391(f).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AERONAUTICAL RADIO, INC. File No. L-2516

Licensee of Business Category
Trunked Radio Station KNEM-214
at the Dallas/Fort Worth
International Airport

Petition for Reconsideration

MEMORANDUM OPINION AND ORDER

Adopted: November 23, 1988; Released: December 7, 1988

By the Chief, Private Radio Bureau:

I. INTRODUCTION

1. Aeronautical Radio, Inc. (ARINC) provides air-ground voice and data communications and aviation terminal communications at Dallas/Fort Worth International Airport. ARINC here seeks reconsideration of the automatic cancellation of five of ten channels assigned its trunked radio station KNEM-214, a Business Service station operating at the airport. In the alternative, ARINC requests *nunc pro tunc* designation as an extended implementation or "slow growth" licensee, pursuant to Section 90.629 of the Commission's Rules, 47 C.F.R § 90.629[1].

II. BACKGROUND

2. The Commission authorized ARINC five channels at the Dallas/Fort Worth International Airport in April 1984. By October 1985, these channels were loaded with over 400 mobiles.[2] Faced with a need to accommodate additional demand, ARINC pursued two different, parallel courses. First, ARINC began negotiations with Metro Mobile Communications, Inc. (Metro Mobile), a Dallas SMR operator, to purchase Metro Mobile's five-channel SMR station KNHH-623. During these negotiations, ARINC had Metro Mobile move its SMR system to the Dallas/Fort Worth International Airport and operate it, beginning in November 1985, under a sharing arrangement with ARINC. ARINC brought in two of its own repeaters to permit operation in conjunction with the Metro Mobile system. In March 1986, an application to assign KNHH-623 from Mobile Media to ARINC was filed with the Commission. [3]

3. During this same period, ARINC sought modification of its existing license to add five additional channels to its system. modification of KNEM-214 was granted on March 19, 1986, which added the five channels requested. In April 1986, the Commission denied the Metro Mobile-ARINC assignment application on grounds that ARINC's 420 unit loading total could not justify assignment of channels beyond those granted by the modification.[4][5]

4. Having obtained equipment for the new channels, ARINC discovered that its old and new frequencies could not be operated together without intolerable interference. Again, the licensee pursued two courses simultaneously, on the one hand negotiating with Metro Mobile for a swap of its SMR frequencies for ARINC's business frequencies, and on the other seeking a technical solution to its interference problems. In the fall of 1987 ARINC discovered and implemented a technically feasible solution to its interference problems, and by March 1988 had converted its base equipment to operate on the new frequencies.[6]

5. On April 15, 1988, a Commission representative inspecting KNEM-214 found that the second group of channels assigned the system had been constructed and placed into operation about one month prior to the inspection and a year after construction was required. By letter of May 24, 1988, the Private Radio Bureau reminded ARINC of its obligation to have placed the second five channels into permanent operation within one year of their March 19, 1986 grant date. Under Section 90.631(f) of the Commission's Rules, 47 C.F.R. § 90.631(f), the Bureau pointed out, the license for those five channels cancelled automatically when this obligation was not met, requiring modification of the KNEM-214 license to delete these five frequencies. ARINC seeks reconsideration of this modification and of its resulting loss of five channels.

III. SUMMARY OF THE PLEADINGS

6. ARINC maintains in support of its request for reconsideration that its efforts during the construction period were continuous, diligent and successful, in that it "effectively" constructed at least eight channels at the airport: its original five channels plus three channels licensed to Metro Mobile but operated jointly with ARINC's five. Furthermore, ARINC argues, its current loading total of approximately 600 mobiles and its plans to expand to as many as 1,500 mobiles demonstrate that its ten channel system is and will be fully utilized. Hence, the primary purpose of Section 90.631, preventing the warehousing of scarce spectrum space, would not be served by cancellation.

7. In any event, ARINC asserts, Commission rules do not provide for cancellation of its channels. ARINC claims that the one year construction requirement of Section 90.631(e) does not provide for automatic cancellation as a penalty for non-compliance, while the terms of Section 90.631(f), which do include automatic cancellation, require permanent station operation, not construction. Since a station is defined by Commission rules as "one or more transmitters and receivers . . . necessary at one location for carrying on a radio communication service . . . ",[7] ARINC concludes that station KNEM-214 was placed in permanent operation when its first transmitter and receiver began operating in 1984.

8. Turning to arguments of equity, ARINC asserts that it met with Commission staff four days after its construction deadline expired to discuss interference problems and the possibility of a frequency swap with Metro Mobile. At no time during this meeting was the possibility of a channel loss raised, ARINC states.[8] Had Commission staff

alerted it to this possibility, ARINC continues, it would have sought immediate relief to the problem. Instead, ARINC maintains, it relied upon the Commission's "tacit agreement" to pursue a remedy to its interference problems. ARINC asserts that the Commission, under these circumstances, is estopped from recovering its channels. ARINC concludes that the public interest also favors retention, as loss of channels would compromise its ability to service and supply airplanes and to respond quickly in emergency situations.

9. As an alternative to reconsideration, ARINC requests authorization as a slow growth licensee, citing the size of its fleet of mobiles and the complexities involved in placing its system into operation.

10. Bell Communications, Inc. (Bell), a licensee of two SMR systems in the Dallas/Fort Worth area and an equipment and service provider for other land mobile users there, filed an opposition to ARINC's request. Bell asserts that neither ARINC's interpretation of Commission rules nor its theory of "effective" construction are supported by fact or law, and no basis for adopting either rationale is apparent. Nor is there evidence of "diligent" pursuit of construction in the record, Bell continues. In this regard, Bell notes particularly that ARINC did not discover a technical solution to its interference problems until 17 months after its license was granted, and that the licensee required several additional months afterwards to place the channels into operation. Most significant, Bell maintains, is the fact that ARINC failed to submit a timely request for extension of time to construct, a failure that is not excused or waived by "tacit agreement" of Commission staff after the construction deadline had passed. Bell argues that the Commission has consistently rejected late-filed extension requests, citing *P & R Temmer v. FCC*, 743 F.2d 918 (D.C. Cir. 1984), and it has refused as well to accept actual or anticipated expansion as a grounds for reinstating cancelled authorizations.

11. ARINC in reply[9] emphasizes both the diligence of its efforts to resolve its interference problems and the critical nature of the services it provides. In this latter regard ARINC submits a letter from an American Airlines official detailing the Airline's reliance upon ARINC's services for its operational and safety needs at the Dallas/Fort Worth International Airport and its inability to obtain comparable services from other providers. Further, ARINC argues, the standards established in *P & R Temmer, supra.*, for commercial SMR operators are not appropriate for non-profit business licensees, particularly in cases where public safety concerns are raised.

IV. DISCUSSION

12. All trunked station licensees in the 800 MHz band, regardless of their classification or characteristics, receive their authorizations on condition that they construct within a one year period, and suffer automatic cancellation under the terms of their license if the condition is not met. This is not a sanction, but a condition of the license, and applies to each channel assigned. To interpret Sections 90.631(e) and (f) as ARINC proposes, to permit construction and operation of one channel or group of channels to guarantee retention of all additional channels licensed now or in the future, would be to nullify the automatic cancellation and channel recovery policies embodied in our rules. These policies ensure that scarce spectrum space is either put to prompt use by the existing licensee or returned to the Commission for reassignment to another ready and able to construct. *See e. g. Associated Information Services Corp.*, FCC 88-267, issued September 21, 1988, and *Digital Radio Network*, FCC 88-268, issued September 8, 1988. Were we to recognize construction and operation of one channel as justification for holding other channels idle indefinitely, the public interest benefit of these policies would be quickly lost.

13. Having thus concluded that ARINC's channels did cancel automatically for failure to construct, we consider its proposed bases for waiver and reinstatement of its authorization. Diligent pursuit does not in and of itself excuse a failure to construct or timely seek an extension of the construction period. "Both this Commission and the Courts have consistently held that the consequences of independent business decisions do not release a licensee from its responsibilities to implement its stations in accordance with our rules." *Associated Information Services Corporation, supra*, at p. 2. Nor does "effective" construction of channels licensed to another substitute for construction under one's own authorization. The Commission in enforcing obligations and assessing penalties holds the licensee of record responsible for station affairs.[10] With regard finally to construction and loading after the construction period has expired, we cannot permit these activities to remedy failure to construct in a timely fashion without compromising the effectiveness of our rules. If, for example, construction and operation within three years can excuse lack of construction in the prescribed one year, then enforcement of the one year requirement becomes a meaningless or arbitrary exercise.

14. ARINC's estoppel and public interest arguments are also unavailing. Commission staff members, meeting with licensees to discuss problems and solutions, can only assess information actually presented to them by the licensee and advise as to possible consequences and outcomes. They cannot study all aspects of the licensee's record or issue binding oral waivers and conclusions. ARINC does not claim, in this regard, that it relied to its detriment upon an express response to a specific question. Nor does it indicate any effort on its part to confirm in writing to the Commission its understanding of information conveyed.[11] ARINC instead complains that when it met with Commission staff members, shortly after the cancellation date, to discuss its interference problems and the possibility of a frequency swap with Metro Mobile, those staff members failed to apprise it of the status of its application, a topic that was apparently not one of the subjects under discussion. According to ARINC, Commission staff members, having agreed to discuss with it certain limited interference problems, were then obligated to study all aspects of ARINC's operation, including the status of its licenses, and advise it regarding rule compliance. This position is untenable. Responsibility for knowing and fulfilling the obligations of a license falls squarely and exclusively upon the licensee.

15. As for ARINC's reliance upon its contributions to airline safety, we do not consider them sufficient to justify reinstatement. ARINC's primary function is the provision of business communications services to the airline industry. Nothing in the pleadings before us suggests that these services, and any emergency assistance incidental thereto, cannot be provided on its remaining channels or by others. This is not to say, of course, that ARINC's public safety efforts are insignificant or unimportant.

They are, rather, as presented, neither sufficiently large in scope nor unique in character to justify the extraordinary relief requested.[12]

16. We turn finally to ARINC's request for *nunc pro tunc* designation as a slow growth licensee. Section 90.629(a) in relevant part limits extended implementation schedules to licensees of unusually large or complex systems. In ARINC's case, however, problems arose not from the inherent size and complexity of the system itself, but rather from interference problems and the methods it chose to resolve them. Such problems do not change the initial character of the proposal so as to extend retroactively the length of the construction period. At most, they form the basis for a timely extension request, a course which ARINC could have, but did not, pursue.

V. CONCLUSION

17. In view of the above, we conclude that ARINC's authorization cancelled automatically for failure to construct, that waiver of our rules to permit reinstatement is not warranted and that modification of its authorization to reflect loss of the unconstructed channels was proper.

18. Accordingly, IT IS ORDERED, that Aeronautical Radio, Inc.'s petition for reconsideration IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

FOOTNOTES

[1] Section 90.629 permits construction periods of up to three years for licensees with unusually lengthy or complex requirements for planning, financing or construction.

[2] Petition for reconsideration at p. 4.

[3] *Id.* at pp. 4-5.

[4] *Id.* at p. 5.

[5] Section 90.627 of our Rules, 47 C.F.R. § 90.627, at that time required licensees seeking additional trunked systems within 40 miles of an existing system to have loaded the existing system to at least 80 mobile units per channel. ARINC's loading total thus entitled it to five - but not ten - additional channels.

[6] *Id.* at pp. 5-6.

[7] Section 2.1 of the Commission's Rules, 47 C.F.R. § 2.1.

[8] Petition for reconsideration at p.7.

[9] ARINC's reply is accompanied by a request to file the pleading one day late. In support, ARINC cites delay in receiving information to be submitted to it by a third person and included with its reply. While a timely pleading supplemented later by the third party's information would have been the preferable course of action, we will grant ARINC's request in light of the brief delay and lack of prejudice involved.

[10] *See e.g.* Triad Broadcasting Company, 96 FCC 2d 1235 (1984).

[11] *See* P & R Temmer, 743 F.2d at 931.

[12] Compare in this regard our decision in New York Transit Authority, Mimeo No. 4383, released September 1, 1988, wherein waiver and reinstatement were found essential to the safety of millions of bus riders.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	
MTS and WATS Market Structure	**CC Docket No. 78-72**
Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board	**CC Docket No. 80-286**
Establishment of a Program to Monitor the Impact of Joint Board Decisions	**CC Docket No. 87-339**

STUDY AND REPORT

Adopted: November 18, 1988; Released: November 25, 1988

By the Federal-State Joint Board: Commissioner Lehr concurring and issuing a statement.

I. INTRODUCTION AND BACKGROUND

1. On March 31, 1987, we released a recommended decision and order (*NTS Recovery Recommendation)* proposing that the Federal Communications Commission (Commission) implement limited increases in subscriber line charges (SLCs), expand the federal lifeline assistance program, retarget the formula for high cost assistance, and modify the current mandatory common line pooling system.[1] We concluded that the four goals of this proceeding – to prevent uneconomic bypass, preserve universal service, eliminate service pricing discrimination and enhance the economic efficiency of the network – would be best served by these further steps in this longstanding proceeding. These recommendations were adopted with modifications by the Commission in an order (*NTS Recovery Order)* released May 19, 1987.[2]

2. Pursuant to our recommendations, the Commission directed us to develop and recommend a plan for monitoring the effects of these changes to ensure that the changes we recommended do not produce unanticipated results which are contrary to the public interest. In addition, we proposed that a 90-day study and review of the impact of subscriber line charges be conducted by the members of the Joint Board and the Commission in late 1988 and early 1989 immediately in advance of each of the final two increases in SLCs.[3] We provided that the information collected by this comprehensive monitoring plan would serve as the foundation for these reviews. This report concludes our first 90-day study and review.

3. On May 28, 1987, we released a recommended decision and order (*Monitoring Recommendation)* recommending the specific subjects and reports to be included in our monitoring program.[4] We recommended that the monitoring reports include information in eight categories: (1) subscribership and penetration levels; (2) lifeline assistance plans; (3) costs and high cost assistance; (4) network usage and growth; (5) rates and revenues; (6) bypass; (7) pooling and rate deaveraging; and (8) jurisdictional shifts in revenue requirements. Our recommendations were adopted by the Commission in an order (*Monitoring Order)* released on August 26, 1987.[5]

4. Pursuant to the *Monitoring Order*, the first five quarterly monitoring reports were released and widely disseminated throughout the industry, among state regulators, and to members of Congress. The first monitoring report was released in September 1987 and the most recent in September 1988. To help us conduct our first 90-day study and review, the June 1988 monitoring report was made especially comprehensive, containing over 250 pages of information. The June report requested that interested parties file comments on the information compiled therein with the Commission by August 29, 1988, and reply comments by September 28, 1988. In response to this request, nine parties filed comments and sixteen parties filed reply comments.[6]

5. We established the monitoring proceeding as an open docket in order to permit parties to file at anytime and to provide relevant information on the issues or suggestions regarding our monitoring procedures. A number of parties have filed information and comments in response to this open docket invitation. We also directed the LECs to collect and file reports and data to permit a more comprehensive record for our review.

6. This monitoring docket was established to gather relevant information to permit us to assess whether our recent NTS recovery recommendations are bringing about the anticipated effects, or whether effects, adverse to the public interest, may be occurring. We begin our evaluation of whether our NTS plan has had any unanticipated results contrary to the public interest by briefly reviewing the effects that we anticipated in our *NTS Recovery Recommendation*. First, we anticipated benefits in the form of greater economic efficiency. The SLC increases produced reductions in the carrier common line (CCL) charge, and we anticipated benefits to result from those CCL charge reductions. Chief among those benefits was our expectation of greater usage of this fixed cost plant which means lower per minute charges for all users. We expected uneconomic bypass to be deterred to the extent that price is a factor, since users would have less incentive to seek a price advantage by avoiding paying the CCL charge. With the lower CCL charge, we expected service pricing discrimination to be reduced between switched and special access. We also anticipated that further efficiency gains will result from the common line pooling modifications that will take place when the residential and single-line business SLC reaches its final level of 3.50 per line per month. We determined that, when the SLC reached that level, the average CCL charge will be low enough to permit depooling without toll rate deaveraging. We expected that universal service would be preserved. Some parties were concerned that the SLC increases might be harmful to universal service, and it was this concern that caused us to recommend that the increases be gradual and that a 90-day study and review be conducted before the final increases.[7] However, we expected to achieve these various benefits without harm to our universal service goal. Moreover, in order to further our universal service goal we took steps to expand the federal lifeline program and we introduced the Link-Up America program.

II. SUMMARY OF COMMENTS

7. AT&T filed data concerning the impact of the subscriber line charge on the recovery of interstate non-traffic sensitive (NTS) costs. AT&T notes that the data indicate that the interexchange carriers will continue to pay approximately half of the exchange carriers' interstate NTS costs through the CCL charge on a nationwide basis.[8] It further states that the implementation of the Commission's SLC plan and targeted support mechanisms such as the High Cost Fund, Lifeline, and Link-Up America programs have resulted in significant reductions in interstate long distance rates (34% for AT&T) and have maintained the universal service goal.

8. Ameritech states that the data in the monitoring reports provide the Commission with sufficient information to verify that its regulatory agenda remains on track. Ameritech argues that the Commission's access charge plan is achieving the goal of preserving universal service, as evidenced by record high penetration levels reached in March 1988 for households and individual adults, the lack of evidence of adverse effects of the SLC increase on telephone disconnections, and the growth of telephone usage. It concludes that claims that SLCs would adversely affect universal service are unfounded.

9. Bell Atlantic observes that telephone subscribership is at an all-time high. Bell Atlantic notes that Link-Up America programs have been widely adopted. It indicates that a Commission proposal to relax the eligibility requirements for Link-Up assistance would help even more needy households. It concludes that these steps should help ensure that telephone subscribership levels will continue to climb. Bell Atlantic also states that disconnect studies show no evidence that SLC increases have had any adverse effect on the customer disconnection rate. It further says that the bypass reports submitted by the exchange carriers demonstrate that the threat of bypass remains strong and will continue to grow as long as access prices remain higher than costs. It indicates that this bypass evidence suggests that exchange carriers should be allowed to use flexible pricing to meet competition. Bell Atlantic concludes that the Commission should implement the scheduled increases in the SLC.

10. ICC claims that the monitoring reports contain faulty or unsupported information based on assumptions by individual local exchange carriers (LECs) regarding what constitutes bypass. ICC says that the LECs are facing competition for those services which they themselves have already moved off of the public switched network (PSN). It argues that the services of emerging competitive entrepreneurial firms in this country, including ICC, for the most part do not constitute bypass according to the Commission's own definition. It asserts that use of non-LEC facilities for high-capacity service offerings is clearly not bypass of facilities available to the general public since such traffic would not have used facilities available to the public. Therefore, ICC argues that it does not compete with switched access service. It states that the Regional Bell Operating Companies (RBOCs) do not permit alternative access providers to interconnect networks using, for example, ICC facilities to deliver an interexchange carrier's traffic to a central office. Thus, ICC contends that the RBOCs encourage the interexchange carrier to construct facilities which may bypass the RBOC's central office. ICC states that the existence of alternative access providers allows businesses and government to duplicate facilities to avoid having all communications channels shut off by a major LEC switch failure. ICC says that its customers have often indicated that the selection of ICC facilities was for technological reasons, customer service reasons, or the lack of availability of a service by the C&P Telephone Company. ICC further argues that Bell Atlantic, in its bypass report tables, should have used revenues from DS-3 and DS-3 like services such as fiber to calculate special access revenue gained. ICC also asserts that the assumption of usage of 5,000 minutes of use per circuit per month by the LECs greatly exceeds actual private network usage and should be reduced to no more than approximately 3,000 to 4,000 minutes. ICC concludes that the bypass estimates in the monitoring reports must be refined, because the LECs should not be allowed to claim that bypass includes everything which does not go over the local network.

11. Teleport asserts that the bypass reports filed by the reporting local exchange carriers are inconsistent. It argues that the Joint Board staff should: (1) require that future reports address only that activity that is consistent with the definition of bypass previously employed by the Commission's Common Carrier Bureau; (2) determine a consistent minutes-of-use factor or require the carriers to explain the basis for their assumptions; and (3) determine consistent fill factor assumptions or require the carriers to explain the basis for their assumptions. It contends that the Joint Board's focus should turn from issues of quantity of service to quality as the universal service goal is reached.

12. US West responds to Teleport's April 13, 1988, proposals to modify our bypass monitoring program. US West supports our efforts to monitor and quantify bypass. US West, however, maintains that to implement Teleport's proposals would require an unreasonable expenditure of time and resources on the part of the LECs. It argues that, in most instances, Teleport's proposals will not promote the production of the relevant, available bypass data required by the monitoring reports because the particular kind of data requested by Teleport are not available to the LECs. US West requests that no additional reporting requirements be placed on the LECs at this time because it believes that the burden of producing the data far outweighs its value. US West also provides updated information on lifeline programs in its service area. It states that no adverse effects on consumers have been found as a result of past increases in the SLC. Therefore, it supports the next scheduled SLC increase, effective December 1, 1988.

13. USTA states that no adverse impact on subscribership has resulted from the current SLC. It notes that telephone penetration and subscribership have increased, and that the disconnect studies have found that disconnections have not increased because of the SLC. It indicates that the initial results reported regarding the expanded lifeline assistance and Link-Up America programs demonstrate that many low-income households that previously did not have telephone service have been brought onto the network. Thus, it argues that the goal of universal service has been furthered and the planned SLC increases should be implemented. USTA also says that traffic data show that the imposition of the SLC has stimulated use of the public switched network. It contends that price index data show no adverse impacts from the SLC since the SLC increases have been offset by a 34% reduction in interstate toll rates. It further argues that pending rate requests have declined dramatically, resulting in a decline in the

national average for flat rate residential telephone service, and showing that telephone companies are cutting costs and increasing efficiency. USTA also says that the pooling and high cost provisions of the Joint Board plan have benefitted small and mid-sized carriers. It contends that the first set of bypass data forms show no evidence that the risk of uneconomic bypass has been reduced significantly with the existing SLC, and thus the implementation of the final SLC adjustments is still required to sufficiently reduce bypass concerns. USTA concludes that the monitoring program we developed has provided valuable information regarding the impact of the recommendations adopted by the Commission, and that the June 1988 Monitoring Report confirms, in particular, that this Joint Board's plan to provide for a gradual increase in the SLC is succeeding in encouraging the efficient use of the network and should be fully implemented.

14. DCPSC concludes that the data in the June 1988 Monitoring Report do not justify further increases in the SLC. DCPSC notes that network efficiency has been furthered by increased network usage. It also states that the Commission has eliminated any unreasonable discrimination and undue preference among rates for interstate services. It argues, however, that the threat of uneconomic bypass and the preservation of universal service do not justify further increases in the SLC. It says that the data in the June 1988 Monitoring Report are unreliable and do not permit a useful analysis of bypass activity. DCPSC contends that we should not rely on any conclusion derived from the bypass data in the monitoring reports because a number of errors are apparenty associated with the reports, and bypass could be overstated. DCPSC also asserts that the RBOCs have relied on flawed methodologies to estimate facilities bypass. The calculation of revenue loss due to bypass by NYNEX, for example, as "cost plus 20 percent of replacement facilities," appears highly suspect to DCPSC because it ignores the fact that the capacity of fiber is a function of the electronics of the system rather than the average cost of placing and maintaining fiber cables, and it does not account for capacity or usage. DCPSC also says that if bypass is occurring as rapidly as Bell Atlantic contends, the 1985 microwave study, which is used as a basis for the facilities bypass multiplier, is likely to be incorrect and, consequently, the bypass potential of other technologies also would be inaccurate. In addition, DCPSC states that only Ameritech and Southwestern Bell indicate that they deduct unused capacity in developing the impact of microwave voice equivalent channels, and asserts that, absent this deduction, bypass would be overstated. DCPSC also claims that bypass inconsistencies apparently exist in BellSouth's analysis of facilities bypass. For example, DCPSC asserts that the actual bypass activity noted in Exhibit II of BellSouth's bypass report does not correspond to estimated revenue loss from bypass that is indicated in BellSouth's Exhibit I. Finally, DCPSC argues that revenue loss is not an accurate measure of the effect of bypass, because revenue loss does not indicate whether the current and projected levels of bypass will lead to stranded investment and, in addition, the RBOCs have apparently failed to adjust the amount of lost revenues to reflect the cost savings associated with reductions in services. Thus, DCPSC concludes that, in light of errors it believes to exist in the bypass reports, the threat of uneconomic bypass does not justify the proposed increase in the residential and single-line business SLC to3.20 in December 1988. DCPSC also indicates that telephone penetration rates have declined in the District of Columbia since Current Population Survey data began being collected in November 1983. DCPSC also notes that the decreases in penetration were largest for low-income households, in spite of the introduction of lifeline and Link-Up America programs. Thus, it argues that the subscriber line charges have not had a beneficial effect in the District of Columbia.

15. NASUCA filed a motion asking us to recommend, and the Commission to adopt, the elimination or suspension of further SLC increases. In support of its motion, it submits three studies: (1) Ben Johnson Associates, Inc., "An Evaluation of the Interstate Subscriber Line Charge" (BJA); (2) Economics and Technology, Inc., "Analysis of Local Exchange Carrier April 1988 Bypass Data Submissions" (ETI); and (3) Bethesda Research Institute, Ltd., "Bypass and the Subscriber Line Charge" (BRI). ETI and BRI address the issue of bypass, while BJA addresses each of the four goals of the Commission's access charge plan. NASUCA argues that the bypass threat "has proven to be much more bark than bite." It concludes that these studies show that further increases in the SLC are unnecessary, unsupported, and unwarranted. Summaries of each of the studies follow.

16. BJA argues that the anticipated efficiency gains of SLCs remain entirely speculative. It contends that the presumption that increased network usage will result in increased efficiency has two flaws: (1) usage growth does not improve efficiency unless off-peak usage grows faster than peak usage, and (2) network efficiency does not necessarily imply economic efficiency. BJA says that AT&T has reduced day rates more than other rates, thus stimulating peak usage more than off-peak usage. BJA also claims that there is no strong correlation between the imposition of SLCs and increases in traffic. It states that economic efficiency requires marginal cost pricing. It criticizes the monitoring reports for reporting the embedded costs of access rather than the marginal costs of access. It argues that the marginal costs are less than the embedded costs and that the SLC should not exceed the marginal cost. BJA concludes that the low marginal cost of access lines implies that raising the price for connecting to the local network (through increases in the SLC) moves that price not closer to cost but farther from it. It adds that this action thus reduces efficiency in the market for basic exchange service by unduly discouraging customers from joining or remaining on the network. It argues that increases in telephone penetration in recent years may have been due to increases in income or other factors. BJA notes that, although the national penetration rate has been increasing, nearly a third of the states showed decreases in penetration between November 1987 and March 1988. It also notes that penetration rates remain low for certain segments of the population, such as those with low income, those in younger age groups, blacks, Hispanics, and the unemployed. It argues that the disconnect studies are inadequate and that more thorough analyses must be conducted before any further subscriber line charge increases occur. It suggests an examination of long-run trends and cycles in penetration, the reporting of penetration by income for individual states, and greater consistency in the disconnect studies. It maintains that the SLC results in inequitable pricing because it ignores the fact that large customers receive more value from telephone services than do small customers, resulting in a shift in costs from actual users to potential users. BJA

contends that ETI's analysis of bypass shows that no linkage has yet been established between the level of bypass and the imposition or escalation of the SLC. BJA concludes that the bypass data found in the monitoring reports, to the extent they can be relied on at all, have absolutely nothing to contribute to the issue of a higher SLC, positively or negatively.

17. ETI conducts an analysis of the bypass studies filed in the monitoring docket. ETI states that the LEC bypass studies ignore relevant economic and operational conditions, and consequently the LECs' submissions avoid the question of whether bypass is susceptible to changes in public policy. ETI claims numerous mischaracterizations and inconsistencies in the LECs' bypass data, including overstatement of bypass losses, misaccounting of data communications traffic, unsubstitutability of purported bypass substitutes for switched network services, overestimation of bypass traffic, mischaracterization of what constitutes service bypass, and incorrect reliance on tariffed prices in considerating bypass economics. ETI finds that the LECs' bypass submissions do not begin to fulfill the objectives of evaluating whether present access charge policies affect bypass incentives in any meaningful way. ETI concludes that, based upon such submissions, the bypass issue must continue to be viewed as illusory insofar as federal access charge policy is concerned.

18. BRI presents an analysis similar to an earlier BRI analysis which NASUCA commissioned in June 1987. The June 1987 analysis considered and discounted certain bypass studies which the Commission had submitted to Congress in 1987 to support the adoption of the SLC. Similar to the 1987 analysis, BRI tenders comments regarding the bypass data in the monitoring reports, arguing that the linkage between bypass and subscriber line charges has not been substantiated to warrant such a charge. BRI finds the data filed by the RBOCs to be disjointed and unsupported, and that these data do not permit testing of the results provided, thereby leaving a critical information gap. It claims that the submissions do not support a higher SLC. BRI concludes that the Commission's increase in its SLC for interstate access to local public switched facilities is unwarranted. It argues that the fundamental justifications or evidence advanced by the Commission in support of the original and higher SLCs are flawed. It claims that bypass is neither a current threat nor a problem of imminently major proportions. It says that bypass prospects do not presently place universal service in jeopardy, but may actually afford evidence of proper economic behavior of users. Additionally, BRI states that the imposition of the fixed SLC on local access lines could actually encourage bypass of the network by customers with many local lines. BRI concludes that, stripped of its bypass foundations, the SLC increase has little to recommend it.

III. SUMMARY OF REPLY COMMENTS

19. Springirth claims that neither the SLCs nor the SLC increases are cost justified. He states that the telephone industry is healthy. He says that the FCC has the responsibility to make sure telephone rates are just and reasonable, to conduct investigations of telephone rate increases, and to inquire into and investigate all relevant facts. He requests that public hearings be held in various parts of the country, including one in Erie, Pennsylvania, before increases in SLCs are granted. He argues that all of the costs of the telephone access line should not be borne by local service customers. He concludes that SLCs should be frozen at their present level.

20. Connecticut supports NASUCA's request that further subscriber line charges increases be suspended or eliminated. Connecticut argues that residential subscribers have not properly shared in interstate telephone service rate reductions. Connecticut reports that in 1984 the average Connecticut residential flat rate customer made 4.8 interstate toll calls per month while the average Connecticut residential message rate customer made 1.4 interstate toll calls per month. Connecticut claims that AT&T reported in CC Docket No. 87-313 that 50% of AT&T's residential subcribers have an average of less than 26 billed minutes per month. It further observes that AT&T's rate reductions have been greater for daytime rates than for other rates. It concludes that the SLC has only benefitted high-volume customers. Connecticut also argues that the specter of uneconomic bypass does not justify further increases in the subscriber line charge. It cites the analyses conducted on behalf of NASUCA as evidence that the amount of uneconomic bypass experienced by local exchange companies is questionable and is not following the dramatic trajectory envisioned by the Commission in its decision adopting the SLC. It argues that bypass decisions are not necessarily made on the basis of the price of switched access but, instead, on factors such as the ability to receive continous and uninterrupted service. Additionally, Connecticut asserts that bypass has not resulted in a direct drop off in traffic growth on the switched network. It states that, in Connecticut, bypass has not posed a significant threat to the local exchange companies or their basic service customers. It states that the cost of both local exchange service and intrastate toll have declined in the years since the Commission's original access charge decision. Connecticut concludes that only the subscriber line charge, not bypass, has raised the price of telephone service to Connecticut customers.

21. DCPSC disagrees with various commenters that increases in the national telephone penetration rate mean that the goal of universal service has been fostered. DCPSC notes that the penetration rate has declined in the District of Columbia in spite of recent rate reductions and the availibility of lifeline and Link-Up America programs. DCPSC contends that the fact that national residential penetration rates have not declined since the implementation of the SLC does not establish that the SLC has no adverse effect. Moveover, it argues that a conclusion that SLC has not had an adverse impact on universal service does not justify further increases in the SLC. DCPSC reiterates its contention that the bypass reports filed by the companies are seriously flawed and offer no reliable evidence that the SLC deters bypass, and notes that its position is buttressed by the comments of NASUCA on the efficacy of the bypass data in the June 1988 Monitoring Report. It concludes that the Commission should deny any additional SLC increases. DCPSC offers some suggestions for the collection of more accurate bypass data in the future. It says that an effective monitoring effort can be carried out only by properly framing, and gathering data that address, the following questions: (1) how serious is the threat of bypass, and (2) how does a company decide whether to bypass? It contends that simply listing instances where a telepone subscriber has left the network or changed services, as the RBOCs have done in their bypass reports, is not sufficient to answer these

questions. It suggests that one approach to answering these questions is to analyze the outward movement history of large business customers. It asserts that local exchange carriers should perform a survey that asks respondent companies about their decision to leave the network. It indicates that this approach can be expanded to include potential bypass as well. DCPSC concludes that, until such in-depth studies are performed, the threat of bypass can not be determined.

22. The National Rural Telecom Association (NRTA), National Telephone Cooperative Association (NTCA), Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO), and USTA filed joint reply comments. The joint commenters emphasize that NASUCA's attacks on the bypass data and evaluation fail to show that the planned SLC increases are unnecessary or inappropriate because NASUCA has failed to take into account the role of the SLCs in the overall access charge approach. The joint commenters note that the LEC industry has emphasized from the outset that the Unity 1-A package it submitted represented an achievable balance of interrelated sets of issues which formed a part of a comprehensive plan for a coordinated industry structure. They say that the industry continues to support the integrated and balanced package including the remaining two SLC increases. The joint commenters contend that NASUCA's comments have neglected to take into account the comprehensive and integrated program and the balancing of effects and goals that are the heart of the plan. They note that the SLC increases are tied to reduced interstate toll rates. They also observe that, as this Joint Board and the Commission concluded, the SLC increases are needed to allow the pooling modifications which we found will increase incentives for efficiency, since those modifications could not be implemented if companies were compelled to remain in the pool to prevent excessively high access charges. They say that this Joint Board and Commission also found that SLC increases are important to the long term pooling support adopted to prevent: (a) excessively high access charges for companies that continue to need the benefits of CCL pooling, and (b) consequent increases in toll deaveraging pressures. The joint commenters assert that these and the other parts of the plan, including the retargeted high cost assistance and the lifeline and Link-Up mechanisms, represent similarly interdependent elements which the NASUCA analysis ignores. They conclude that NASUCA's filing does not show that the SLC increases are either unnecessary or inappropriate or that there have been or will be effects from the intergrated plan that justify upsetting the careful balance struck by this Joint Board and the Commission.

23. OPASTCO also filed separate reply comments. It believes that the need for SLC increases still exists and that NASUCA's filing does not prove that the scheduled increases are unnecessary, unsupported, and unwarranted. OPASTCO says that nothing in the record indicates that the SLC has undermined universal service. It notes that the latest subscribership data for July 1988 shows an 0.5% increase in telephone penetration from the previous July, with two million households added to the nation's telephone system. It argues that the 5 million low-income households currently without telephone service could become subscribers through participation in the Link-Up America program, and that the SLC makes this program possible. It states that this is not the first time that NASUCA has claimed that the record on bypass effects does not justify the Commission's decision to increase the SLC. OPASTCO says that the Commission answered the first charge by stating that the decision to increase the SLC was not based solely on bypass effects but also reflects other goals of the entire proceeding. OPASTCO maintains that the record before this Joint Board fully supported the proposition that prices for telephone service that differ widely from the cost of those services provide incentives for bypass. In response to NASUCA's contention that the bypass data does not effectively evaluate the effect of the SLC on bypass incentives, OPASTCO emphasizes that NASUCA has not shown that this bypass data is insufficient to make the policy decision at issue. OPASTCO argues that NASUCA has not refuted the fact that the increase in the SLC will lower all telephone company CCL charges, rates OPASTCO says the Commission views as the driving force behind uneconomic bypass. OPASTCO claims that NASUCA does not appear to acknowledge that bypass is not the only issue at hand and that the SLC is inextricably tied to other aspects of the decisions of this Joint Board and the Commission. OPASTCO contends that the SLC increases are necessary for depooling to work. It says that without the increases, high cost areas will have to charge high CCL rates, which would result in pressure to deaverage toll rates, making those rates unaffordable in rural and other high cost areas. OPASTCO argues that it would be unfair for the Commission to place a moratorium on SLC increases because LECs wishing to withdraw from the common line pool have already had to announce their decision, and that those decisions were based on the expectation that the SLC will be 3.50 when they withdraw on April 1, 1989. It asserts that removal of the SLC increase from the access charge plan would leave the whole decision unbalanced. OPASTCO concludes that NASUCA's failure to realize that the SLC is a part of a bigger picture is a fatal flaw of NASUCA's motion and, therefore, the motion should not be granted.

24. USTA also filed separate reply comments. It says that the SLC has not resulted in any adverse impacts and that, to achieve maximum benefits, the access charge plan must be fully implemented. It argues that the regulators who adopted the SLC transition correctly balanced the need with the risks when they provided for the two remaining steps to complete the plan. USTA notes that several parties complain that the bypass portion of the monitoring plan does not provide sufficient data to justify continuation of the SLC transition, and that one of them seeks to stay the two remaining SLC adjustments. USTA maintains that these parties have ignored the importance of the Commission's change in access pricing and the interrelationship of all parts of the access charge plan. USTA states that NASUCA and the other opposing parties improperly focus their attention almost entirely on the bypass issue to attack the underlying rationale of the access charge plan and to criticize the usefulness of the monitoring process. USTA contends that these parties fail to show that the imposition of the SLC transition has had any negative impact on customers or that the planned SLC increases are unnecessary. It argues that the access charge plan was made necessary by changes in the economic structure of the telephone industry. It asserts that proof of the existence or nonexistence of bypass does not justify the existence or nonexistence of a SLC. USTA says that the record in this proceeding is filled with data and studies on the beneficial impacts of a rate structure that is more properly targeted than the one that existed in the

predivestiture environment. It states that an integrated package that balances the different goals of this proceeding is necessary, and that the SLC increases are an essential part of this package. It indicates that this package includes modifications to common line pooling, which allow the pool to be retargeted to reduce the flow of funds between companies, to encourage economic pricing, and to meet the needs of all companies in a more effective manner. USTA avers that the package also helps to maintain averaged toll rates due to lower CCL rates. It asserts that the Link-Up America and lifeline assistance programs are possible due to the increased revenues generated by increased toll use directly attributable to the toll rate reductions resulting from the SLC increases. It says that the retargeting of high cost assistance similarly helps keep local rates affordable. USTA concludes that if any portion of the package is eliminated, the other portions will be affected. It states that the monitoring reports show that network usage is growing, subscribership is increasing, and low local rates have been maintained. It argues that the NASUCA studies mistakenly focus on bypass as the most important consideration of the access charge plan. USTA also claims that there are a number of incorrect assumptions contained in each of the studies submitted by NASUCA. It disagrees with the ETI assertion that it is incorrect to use average access prices per minute to measure bypass revenue losses. USTA says that ETI implies that local exchange carriers would not realize bypass revenue losses if existing switched access prices were utilized. USTA insists that average access prices do, in fact, determine access revenues, because if minutes are diverted to bypass systems, the revenue loss is based on average access prices. It argues that ETI also incorrectly distinguishes between AT&T's Megacom and similar offerings and bypass. USTA asserts that BRI, in discussing pricing in a competitive environment, completely ignores the ability of large customers to utilize alternatives to switched access. USTA claims that BRI also ignores the fact that economic efficiency can best be realized by prices which reflect the cost and demand characteristics of the market. USTA therefore recommends that the NASUCA motion be denied.

25. Ameritech also opposes NASUCA's motion. It says the goals of the access charge plan are being achieved. It states that the Commission's decision to adopt and gradually increase the SLC as part of an integrated and carefully balanced regulatory package was reasonable when made and is reasonable today. It asserts that the first year's monitoring data clearly show that recent increases in the SLC have not had an adverse effect on universal service. It argues that attempts in this docket to rehash the Commission's decision to adopt and gradually increase the SLC should be categorically rejected, both as a matter of law and as a matter of policy. It contends that NASUCA has not met the burden of showing that good policy reasons exist for the Commission to revisit its decision to increase the SLC and to act without regard to the effect on other parts of an integrated and carefully balanced access charge plan. Ameritech argues that, even if the decision to bypass is not based exclusively on price, price is a major consideration that drives the decision to bypass. It states that an equally important consideration in the bypass decision is the customer's expectation of future prices. Ameritech contends that, if the Commission uses this docket to signal the marketplace that its access charge plan is going to be abruptly changed mid-stream, it invariably will have a direct effect on customers who today are making decisions about how their telecommunications traffic will be carried in the future. It says that NASUCA's argument that the SLC is an inequitable way to recover the NTS common line costs has been considered and rejected by the Commission on at least two separate occasions and should be rejected again. Ameritech maintains that the Commission should not impose additional data requirements at this time for monitoring bypass. Ameritech agrees with US West's comments that Teleport's April 13, 1988, proposals for additional data requirements to measure bypass should be rejected. Ameritech cites two Bell Communications Research studies that show that the SLC has not adversely affected telephone subscribership. Ameritech says its own disconnect studies confirm this conclusion. It notes that various studies have shown that the SLC has not only improved the efficiency of the telephone network, but also has produced general economic benefits by stimulating the national economy and keeping prices down. It says that by reducing the reliance on usage sensitive prices to recover NTS costs, service pricing discrimination has been reduced and thus the incentives for bypass have been reduced. It contends that ETI fails to understand that the examples of bypass given in the carriers' bypass reports are not intended to show all of the estimated bypass included in Form III of the reports. Ameritech argues that ETI proves nothing by recalculating bypass losses using rates other than current rates. Ameritech also claims that various other criticisms by ETI of the bypass reports are inappropriate.

26. Bell Atlantic argues that the studies and data used by DCPSC and NASUCA are flawed. Bell Atlantic observes that, contrary to DCPSC's claim of declining subscribership in the District of Columbia, telephone penetration in the District has increased from 91.6% in March 1985, just before the residential SLC was implemented, to 94.4% in July 1988. Bell Atlantic contends that NASUCA's bypass evidence suggests that without the Commission's SLC program, far greater bypass would have occurred, threatening the very universal service that NASUCA seeks to maintain. Bell Atlantic asserts that little question exists that the SLC has promoted economic efficiency by promoting more use of the PSN and by avoiding the construction of duplicate, unecomonic bypass facilities. It says that, contrary to ETI's claim, Bell Atlantic specifically excluded from its bypass reports classes of special access services that are not candidates for use of the PSN. It defends the rate it used to estimate bypass revenue loss as the rate that was specified by the Joint Board staff. Bell Atlantic states that, contrary to the position of ETI, both the Commission and AT&T agree that Megacom is a bypass service. Bell Atlantic gives examples to show that ETI is incorrect in its assertion that communications systems along rights-of-way are not bypass. Bell Atlantic criticizes ETI and BRI for confusing "customers" with "lines" in determining the economic crossover point for bypass. Bell Atlantic disputes ETI's claim that Bell Atlantic's switched and special access forecasts are inaccurate and unreliable. Bell Atlantic also disputes ETI's statement that most of the claimed bypass losses are unsubstantiated. Bell Atlantic disagrees with BJA's assertion that SLCs have been detrimental to telephone penetration. Bell Atlantic notes that low income households have benefitted from low toll rates and the lifeline and Link-Up America programs. It also disputes BJA's claim that the SLC is inequitable, noting that this reasoning has already been overruled by the Court of

Appeals, and that, in any case, AT&T's data show that about half of NTS costs are still being borne by interexchange carriers. Bell Atlantic explains that it did not count special access revenues gained from DS-3, as ICC claimed it should have, because it had never considered those revenues as lost. Bell Atlantic also disagrees with ICC's estimate of the circuit utilization by DS-1 services.

27. BellSouth claims that its studies of facility and service bypass employ appropriate methodology and, in fact, represent a conservative estimate of current bypass activity. It asserts that the opponents of SLC increases have used erroneous assumptions and misleading data comparisons to understate the potential threat of uneconomic bypass of the public switched network. BellSouth says that bypass remains highly sensitive to changes in the price of switched access. It maintains that SLCs promote economic efficiency, facilitate competition in the long-distance market, and provide an equitable system for cost recovery. It disputes BJA's claim that there is no relation between SLCs and toll usage growth. BellSouth argues that the evidence clearly shows that SLCs have had no adverse effect on subscriber penetration or disconnect activity. It says that the apparent declines in penetration noted by BJA for some individual states are generally not statistically significant and could be due to sampling error. It observes that the penetration level for unemployed persons increased significantly from November 1987 to March 1988. It concludes that increases in SLCs should be implemented as scheduled.

28. Contel argues that NASUCA's request to eliminate or suspend the scheduled SLC increases is unwarranted and that NASUCA's motion should be denied. Contel discusses three points which, in its view, totally vitiate NASUCA's argument that the Commission should not proceed with the prescribed SLC increases. First, Contel notes that NASUCA argues that the bypass data contained in the monitoring reports do not support the proposition that further SLC increases are necessary to prevent future bypass. Contel asserts that one would not expect the data to prove or disprove the need for further SLC increases because, while the bypass data measure actual bypass, it is the threat of bypass that is the relevant consideration in moving towards flat end user charges. It states that the fact that the SLC increases have been pending has depressed the amount of bypass that has actually occurred. Second, Contel observes that the potential impact of the SLC increases on subscribership levels was a primary concern of this Joint Board when it recommended a comprehensive monitoring effort. Contel says no adverse impact on subscribership levels has occurred as a result of the SLC. Third, Contel notes that the scheduled increase in the SLC to3.50 by April 1, 1989, is but one component of a comprehensive and integrated program for addressing difficult issues related to common line cost recovery. It says this program includes a carefully designed plan for facilitating carrier election to leave the NECA common line pool. Accordingly, Contel argues that the Commission cannot suspend or eliminate these increases without making other significant modifications to its carefully structured common line program, including changes to the depooling elections which were made under the assumption that the SLC increases would take effect as scheduled. Contel asserts that such changes would frustrate attainment of the important public interest objectives that the Commission set out to accomplish when it adopted the Joint Board's recommendations for resolving the common line cost recovery issues.

29. GTE urges the rejection of NASUCA's motion and the implementation of the SLC program as planned. GTE says that this Joint Board and the Commission, supported by the industry, have sought to safeguard universal service by a carefully balanced program. GTE states that the increase in the SLC is an integral part of the Joint Board's recommendations and the Commission's decision to adopt those recommendations. It asserts that the SLC increase to3.50 was explicitly an integral part of what was required to induce large net pool recipients to leave the pool in 1989. It argues that the Commission should not be dissuaded from carrying through on its integral plan, including the SLC increase to3.50. Because GTE has already announced its intention to leave the pool on the basis of an expectation that the SLC would increase to 3.50, it contends that to eliminate the planned SLC increases without allowing carriers to reconsider their withdrawal from the pool would be inequitable. It says that the implications of reopening the pool's membership to these carriers would be extremely complex and serious, and would result in the failure of the access charge plan. It contends that the defects of the studies submitted by NASUCA seriously undermine NASUCA's arguments, and, therefore, the Commission should reject those arguments and proceed to implement the SLC program as planned. GTE asserts that, in an attempt to demonstrate that bypass incentives are largely independent of prices, the ETI study uses an invalid bypass crossover point. GTE contends that the ETI study reflects a basic misunderstanding of the 5,000 minutes of use per month, per voice grade equivalent circuit substantiated in the submission, because ETI confuses it with a 28,000 minutes of use per month figure for a multiline business customer. GTE says that, when this misunderstanding is corrected, the claim that bypass has little relation to price factors is not supported by the ETI study. GTE avers that, contrary to the claim in the ETI study, it is correct for the LECs to use either average access rates or traffic rates to identify the impact of bypass. GTE disputes the ETI claim that Megacom-like services do not represent service bypass. GTE further asserts that ETI's quantitative analysis of the GTE bypass report is riddled with errors, which highlight the deficiencies of the ETI study. GTE argues that the BJA study fails to take into account positive effects of the lower interstate toll prices that have accompanied SLC implementation. GTE contends that BJA's proposal for changing access pricing to favor small users fails to take account of the nature of the SLC plan as developed and its essential purposes. GTE also argues that BJA fails to recognize that multiline business customers pay a higher SLC per line than residential and single-line business customers. GTE maintains that BRI's concern for SLC impacts on multiline customers illustrates the need for achieving economic efficiency through a combination of flexible pricing by the LECs and SLC implementation. GTE concludes that the studies submitted by NASUCA provide no support for NASUCA's position.

30. NYNEX supports the Commission's access charge plan and the decision to increase the SLCs. NYNEX contends that, although a number of parties argue that the Commission should not proceed with its planned SLC increases, no party has carried its burden to show that the access charge plan, including the planned SLC increases,

is either unreasonable or unjustified. NYNEX says that some commenters argue that the Commission should not proceed with its planned SLC increases solely due to perceived flaws in the methodology and assumptions used by the LECs to develop their bypass reports. NYNEX believes that its initial bypass report represents a reasonable attempt to quantify bypass in the NYNEX region. It asserts that the primary purpose of the LEC's bypass reports is to identify what impacts the Commission's access charge policies have had on deterring bypass, and that this cannot be done on the basis of a single set of bypass reports. Thus, it argues that, to the extent that these parties urge the Commission to abandon its SLC increases on the basis of bypass, their comments are without merit. NYNEX contends that even if these parties were able to demonstrate that the Commission's SLC increases have had little or no impact on deterring bypass, the Commission's SLC increases have still promoted a number of other important public policy goals. NYNEX concludes that we should recommend that the Commission proceed with its planned SLC increases. NYNEX says the most compelling evidence of economic efficiency gains is the fact that, during the past year, the overall cost of telephone service has declined by 0.1% while the general rate of inflation was 3.9%. It states that a change in SLC policy at this time would disrupt the industry and jeopardize depooling.

31. Pacific Telesis argues that NASUCA does not present sufficient justification for suspending the remaining two SLC increases. Pacific Telesis asserts that NASUCA ignores the fact that the SLC increases are a necessary part of the Commission's integrated program to ensure that the local exchange carriers' recovery of their NTS costs promotes the Commission's four access charge policy goals. Pacific Telesis contends that NASUCA has failed to take into account the anticipated benefits of NTS cost recovery depooling, which depends on the SLC increases, in achieving all four of the Commission's goals. Pacific Telesis says that, by focusing primarily on the goal of bypass and by ignoring other aspects of the Commission's NTS cost recovery plan, NASUCA has overlooked the long-term benefits to consumers of the SLC increases. In addition, Pacific Telesis avers that the studies on which NASUCA relies contain weaknesses which undercut the related arguments made by NASUCA. For example, Pacific Telesis states that BJA provides no evidence in support of its conjecture that SLC increases correlate with subscribership decreases and incorrectly suggests that network efficiency should be judged in terms of marginal costs. Pacific Telesis notes that marginal cost pricing is not possible without some form of subsidy in an industry experiencing economies of scale. It asserts that withdrawing from the NECA NTS pool provides the ability for efficiently managed companies to pass along savings due to increased efficiencies directly to their own customers rather than to other pool participants. It argues that some of the data and underlying assumptions in the studies, particularly ETI's, are sufficiently inaccurate to undercut the validity of the points made in reliance on the data. Pacific Telesis says the LECs have taken steps to minimize the risk of overstating bypass. It maintains that lost bypass revenues should be compared to received interLATA-related revenues. It asserts that variances among reported bypass levels for different companies should be expected. It notes that the bypass examples provided in the bypass monitoring reports are not exhaustive. It maintains that estimated bypass revenue loss should be based on LEC tariffed rates. It avers that many right-of-way microwave facilities are used for bypass and says that California has experienced significant growth in private microwave bypass since divestiture. Pacific Telesis claims that no direct correlation exists between special access revenues and lost service bypass revenues. It notes that it did not include its DS-3 offerings in its estimate of service bypass. It maintains that the LEC estimate of 5,000 minutes-of-use per voice grade equivalent line, per month is appropriate for quantifying bypass loss. Pacific Telesis opposes the suggestions in the NASUCA comments and in the comments filed on April 13, 1988, by Teleport that the Commission revise the format and content of the monitoring reports. Pacific Telesis maintains that the specific suggestions would not be helpful in monitoring the impacts of the Commission's NTS cost recovery plan.

32. Southwestern asserts that no evidence exists that supports the elimination or postponement of the Commission's SLC program. It states that the monitoring docket was not established to provide a vehicle for perpetual litigation concerning the merits of this program. It claims that NASUCA's motion is actually an untimely petition for reconsideration of the Commission's 1983 access charge order.[9] Southwestern notes that the purpose of the monitoring program is to ensure that there are no unanticipated results contrary to the public interest from the Commission's access charge program. Southwestern maintains that NASUCA's consultants have submitted no evidence on the question of whether SLCs have produced unanticipated results contrary to the public interest. Southwestern avers that, in lieu of evidence, NASUCA and its consultants argue at length, for example, that the LECs have not proven a link between SLC increases and bypass. Southwestern says that it is not the burden of the LECs to prove the utility of SLCs at each phase of the monitoring process, but it is NASUCA's burden to prove that SLCs have had unanticipated results that are detrimental to the public interest. Southwestern maintains that NASUCA has not attempted to satisfy this burden. Southwestern argues that BJA has provided no evidence that SLCs have had any adverse effect on universal service. Southwestern states that it is inappropriate to draw any final conclusion from the submission of one data point in what is intended to become a time series of data. Southwestern asserts that one cannot legitimately determine whether lowering the CCL charge has had a dampening effect on bypass losses from existing bypass levels alone. Southwestern claims that, while the exact magnitude of the bypass problem is disputed, none of the evidence or comments in this proceeding have denied that bypass is a market reality. It adds that it would be unfortunate if the debate concerning evidence of bypass were allowed to obscure other, and equally important, reasons for the SLC program. As an example, Southwestern says that the use of CCL rates to recover NTS costs is inequitable and creates service discrimination between switched and special access, and that SLCs are intended to rectify such inequities. Southwestern disputes BJA's discussion of equity, arguing that it ignores the fact that large customers have more access lines and thus pay more SLCs. Southwestern claims that NASUCA wants discrimination against high-volume toll users without regard to the costs those users impose, and that NASUCA's desire to distribute costs in proportion to benefits is merely an appeal for subsidies based on NASUCA's political preferences rather than equity or economic rationality. Southwestern contends that BJA's argument for value-of-service pricing of

SLCs is faulty because it confuses: (1) access with usage, (2) customers with services, and (3) elasticity with quantity. Southwestern argues that parties criticizing the bypass reports should have made their criticisms when the format of the reports was still under development. Southwestern argues that the wide variety of comments and criticisms elicited by the first attempt at quantifying aggregate data demonstrates that no generally accepted standards exist, and that no generally accepted definition of bypass exists. It defends the use of current rates to estimate bypass revenue loss. It also says that in its bypass report it correctly included the offset of special access revenues gained from the direct connection of an end-user location and an interexchange carrier. It says that, even when price is not the only factor in a bypass decision, a lower price is a necessary, but not always sufficient, condition to trigger bypass behavior. It notes that the monitoring bypass estimates do not differ greatly from previously published information, such as the Huber Report. Southwestern suggests that bypass data be collected from the interexchange carriers, who would be the most reliable source.

33. United claims that NASUCA offers no compelling reasons why this Joint Board and the Commission should abandon the existing plan for recovering interstate NTS costs. United argues that the final increases in the SLC are vital to continued success in achieving the Commission's access charge objectives. It says that much of the material submitted by NASUCA attempts to discredit bypass assessments made by this Joint Board and the Commission in the course of this proceeding, and that NASUCA argues that the threat of bypass is not sufficient to justify increases in SLCs. United maintains that NASUCA's arguments are seriously flawed. United states that, according to NASUCA, local exchange carriers have estimated that two-thirds of the revenues lost to bypass is the result of service bypass. United indicates that NASUCA argues that this is an overstatement of the impact of uneconomic bypass because service bypass includes customers who have switched to private lines for reasons other than price. United contends that NASUCA does not attempt to quantify how much bypass has been caused by factors other than price, and that NASUCA does not dispute that: (1) price disparities exist between switched and special access, and (2) such disparities create incentives for bypass. United also argues that NASUCA ignores the fact that the SLC policy, including the scheduled increases, is the reason that bypass may not be more commonplace. United avers that NASUCA misses the point by taking issue with attempts to quantify bypass, since the absolute level of revenues which have been lost to uneconomic bypass is not determinative. United contends that the issue is that bypass incentives continue to exist because of uneconomic recovery of NTS costs through switched access services. United maintains that the final increase in SLCs is the only way to ensure that price disparities and bypass incentives are reduced to the lowest possible levels. It asserts that NASUCA offers no evidence that SLCs have harmed subscribers or that the corresponding decreases in access costs have not increased network efficiency. United says that NASUCA fails to recognize that the lifeline and Link-Up America programs have been increasingly effective in providing assistance to low-income subscribers. United argues that NASUCA's contention that there is no correlation between SLCs and traffic growth would require that demand be totally price inelastic, an assumption that is without economic rationale and contrary to all empirical evidence. United notes that the SLC increases are only one part of a highly integrated solution to the issue of the proper recovery of NTS loop costs. It indicates that another part of the solution is depooling, which is designed to increase incentives for carriers withdrawing from the pool to reduce costs and improve efficiency and to allow LECs to respond to market-specific bypass threats. United says that its own decision to withdraw from the pool was made on the basis of the final SLC increases being implemented. It argues that delaying or eliminating the final SLC increases would totally undermine the NTS cost recovery plan.

34. US West attacks the comments of DCPSC, NASUCA, and Springirth that further increases in the SLC are unnecessary. US West argues that their proposals are procedurally deficient and without substantive merit. It asserts that, because no unanticipated events have occurred to warrant a change in the SLC, it is inappropriate for the SLC increases to be discarded. It also insists that Springirth is not correct in claiming that the SLC is not cost justified. US West maintains that the DCPSC's analysis of the penetration data is flawed and its conclusions are without statistical validity. It further notes that the alleged decline in the telephone penetration rate in the District of Columbia has no significant impact and no correlation to the SLC. US West urges the Commission to continue its implementation of the scheduled SLC increases. US West disagrees with Teleport's suggestion to expand the monitoring program further to include service quality. US West notes that LECs already file service quality data with the Commission and several state public utility commissions, and that Teleport has not identified a single specific instance of service quality deficiency or demonstrated a need for additional reports to be filed. US West argues against the bypass comments filed by Teleport, DCPSC, and NASUCA. US West says that Teleport has alleged that a major source of inconsistency and inaccuracy has been the assumptions regarding minutes of use diverted from the LECs' network to bypass services or facilities. US West observes that 5,000 minutes of use per month were used as the average circuit capacity, and that this figure has become the standard number as agreed upon by all RBOCs. In opposition to DCPSC's contention that the RBOCs have relied on flawed methodologies to estimate their facilities bypass, US West claims that it has been careful not to include any intraLATA bypass that does not directly relate to access charges, any bypass systems that cannot be substantiated by primary and secondary sources, or any bypass systems that are under construction. US West argues that there are several fallacies and contradictions in the ETI, BRI, and BJA studies. US West says that the apparent inconsistencies ETI notes in the RBOC's estimates of bypass are due to regional differences. US West argues that it would be more meaningful to compare bypass losses to switched access revenues than to total company revenues as ETI does. US West contends that ETI's estimate of the bypass share of circuits is inappropriate, because different kinds of circuits are not comparable. US West asserts that ETI's suggestion that usage of the PSN is stimulated as the result of bypass is unfounded. US West states that the observed rapid growth in usage is attributable to the toll price reductions made possible by the SLC increases. US West defends the reasons for bypass cited in the bypass reports that BRI questions. US West argues that BJA's contention that there is no linkage between the level of bypass and SLC increases is refuted by the record of the Commis-

sion's access charge plan, especially filings by MCI and US Sprint. US West concludes that, to the extent the SLC forms the rudimentary framework of the Commission's access charge plan, the alleged penetration rate decline and bypass report inconsistencies are irrelevant and should be disregarded.

IV. DISCUSSION

35. The present proceeding has its genesis in our March 1987 recommendations to the Commission concerning NTS cost recovery. At that time, we reviewed the effect of our initial 1984 package of NTS cost recovery recommendations[10] which included implementation of subscriber line charges for residential subscribers, federal lifeline assistance, and revisions in the high cost assistance measures. In evaluating implementation of the initial phase of the access charge program, we used our long standing goals in this proceeding: (1) preservation of universal service; (2) promotion of economic efficiency; (3) elimination of service pricing discrimination; and (4) deterrence of uneconomic bypass. We found that implementation of our recommendations had furthered the achievement of these goals, and recommended that the Commission adopt additional measures designed to resolve the issues concerning recovery of interstate NTS common line costs.

36. We specifically recommended that the Commission: (1) gradually increase the cap on interstate residential and single-line business SLCs to3.50 per line over a two-year period, with the final implementation step scheduled for April 1, 1989; (2) increase the lifeline assistance benefits and implement a Link-Up America program designed to help low income subscribers pay initial connection charges; (3) provide for major changes in the pooling of NTS costs for access charge purposes; and (4) modify the provisions for high cost assistance. As we made clear at that time, the goal of these recommendations was to create a balanced national solution to the NTS recovery issues that furthered the long-standing goals of this proceeding. The interexchange industry and the ratepaying public were each to share in recovering the interstate NTS costs. To this end, the proposal carefully integrated interdependent measures designed to further the longstanding goals in this proceeding.[11] We stated that the limited increase in SLCs would result in economic efficiency gains and mitigate the pressure for bypass. We also concluded that the increase in the SLC was necessary to allow important modifications in the CCL pool designed to enhance carrier efficiency.

37. Although we viewed this package as a final recommendation, we proposed a comprehensive program for monitoring implementation of our plan, including a 90-day study and review prior to the two final increases in SLCs. The purpose of the monitoring program and the 90-day studies was to ensure that implementation of our recommendations did not produce unanticipated results that are contrary to the public interest.[12] The commission subsequently adopted our recommendations for changes in the access charge program[13] and our monitoring proposals[14] with minor changes.

38. The record in this proceeding, including our monitoring reports and the comments and replies summarized above, shows that implementation of our recommendations has not produced clearly adverse or unanticipated effects to the detriment of the stated goals. Several of the commenting parties criticize aspects of the access charge plan. NASUCA, DCPSC, Springirth, and Connecticut criticize implementation of SLCs, and Teleport and ICC are critical of the bypass reports. Other commentors dispute these claims. However, none of the critics has shown that our current plan is producing unanticipated results that would warrant modifications at this time. Based on a careful review of the key information concerning achievement of each of our goals, we find that there is insufficient evidence to alter the plan that we recommended in March 1987. The information relevant to each of our basic goals is discussed separately below.

A. Universal Service

39. The record shows that telephone subscribership and penetration have increased during the period since SLCs were first introduced. Between March 1985 (immediately prior to the first residential SLC) and July 1988 (the most recent period for which information is available), 5.5 million households were added to the nation's telephone system.[15] Two million households were added during the past year, from July 1987 to July 1988. The percentage of households with telephone service increased from 91.8% in March 1985 to 92.8% in July 1988 – a change which is statistically significant. The record does not provide conclusive evidence that implementation of SLCs has adversely affected universal service.

40. BJA suggests that subscribership increases may be due to factors other than our access plan. We acknowledge that other factors may have contributed to the increase in household telephone penetration. For example, change in income may tend to be a major cause of change in telephone penetration rates. The economy and personal income may have grown steadily since the implementation of SLCs. Evidence is not available to clearly determine how the access charge plan would have affected penetration levels in the absence of other economic factors. However, neither BJA nor any other party presents indisputable evidence that the access charge plan has adversely affected subscribership. In fact, the disconnect studies discussed in the September 1988 Monitoring Report generally show that most disconnects due to economic reasons involve customers with a high level of unpaid bills. Most of them have high unpaid toll bills, a portion of which are interstate.

41. DCPSC asserts that penetration rates declined in the District of Columbia. It claims that the introduction of lifeline, Link-Up America and recent rate reductions have not improved penetration rates in the District of Columbia. The DCPSC has not been able to substantiate the various causes and effects which led to the decline in the District's penetration rates. The DCPSC attributes part of the decline to local rate increases in January 1984 and January 1986 as well as to the SLC.[16] We agree that the change could be due to local rate increases as well as other factors. The DCPSC did not present evidence of substantial harm which could be attributed to the SLC increases. We note that participation in the District's lifeline program generally is restricted to those over the age of 65, the age group which already has the highest penetration rates. Moreover, the latest penetration figures show an increase in subscribership in the District to 94.4% in July 1988.[17]

42. Connecticut also objects to the implementation of SLCs. Although the State of Connecticut does have a Link-Up program to help cover initial connection

charges, it has not implemented a lifeline program to reduce monthly telephone charges for low income households.

43. We recognize that the increased level of subscribership at the nationwide level will not be experienced in every state. Indeed, there are a variety of factors other than price that affect subscribership levels. Those factors may be different in each of the various states. However, we believe that these variations in subscribership levels can be moderated through implementation of properly targeted lifeline and Link-Up programs. We strongly urge the jurisdictions that do not yet have these programs to take full advantage of the federal benefits that have been made available as a result of our recommendations.[18] These programs, which resulted from implementation of SLCs, are an integral part of our overall access charge plan. Thus, we hope that these benefits will soon be available to all eligible households.[19] Furthermore, we note that non-economic restrictions (such as age) on participation in these programs discriminate against significant segments of the population that could benefit from this assistance. Accordingly, we urge reconsideration of such restrictions.

B. Economic Efficiency

44. The record shows that major toll rate reductions occurred as a result of the implementation of SLCs. Since 1984, AT&T's average interstate toll rates have declined by 34%, much of which is attributable to our SLC program. Substantial increases in toll traffic have also been documented in the record. It is important to recognize that this increase in usage has not increased the LECs' non-traffic sensitive costs since those costs are partially a function of the number of access lines connected to the switched telephone network rather than their calling volumes. NASUCA comments that the growth in toll traffic may also have been in part caused by a generally expanding economy that is based on an increasing reliance on telecommunications.[20] It is also possible that economic growth has been stimulated by decreases in telecommunications costs. Although it has not been demonstrated that the imposition of the SLC was solely responsible for greater toll usage, it is clear that increased usage has unquestionably been stimulated by reductions in toll rates.

45. Parties[21] in this proceeding stress the importance of further implementation of SLCs to the planned changes in the pooling of NTS costs. In our March 1987 *NTS Recovery Recommendation*, we determined that the present mandatory common line pool "limits LEC cost recovery flexibility, establishes economically inefficient cost/price distortions, and reduces LEC incentives to contain costs" since any savings had to be shared with all other members of the pool.[22] In their reply comments and in their notices of withdrawal from the pool, numerous carriers indicate that they have elected to leave the pool based on the expectation that SLCs will be fully implemented pursuant to our recommendations. They emphasize that any change in the current schedule would force them to reconsider their decision in this regard. In addition, they argue that, in the event of any such changes, they should be allowed to rescind their elections to leave the pool. Under these circumstances, the voluntary depooling plan could fail, since only large companies that pay more into the pool than they take out (large company contributors) would withdraw from the pool. Significant reductions in the present support levels cannot be achieved unless the large companies that take more from the pool than they pay in (large company recipients) leave the pool voluntarily as they indicated they would with full implementation of SLCs. Many of the commenting parties also emphasize that moving forward with pooling changes without full implementation of SLCs would create substantial pressure for toll rate deaveraging. As we found in our March 1987 decision, absent the SLC increases, the disparity in carrier common line charge rates could well be too great to allow pooling changes without creating unacceptable pressures for toll rate deaveraging. We continue to believe that efficiency gains are possible with changes in the pooling structure, and find that the record contains insufficient evidence to support abandonment of our March 1987 integrated plan.

C. Price Discrimination

46. The record also shows that the reductions in the originating CCL charge accompanying implementation of SLCs have substantially reduced interstate service price discrimination. The special access lines generally used in conjunction with private line service have traditionally been priced on a flat-rate rather than a usage sensitive basis. Usage sensitive pricing of common access lines used in conjunction with switched services often forces high volume users to pay per minute charges that are substantially higher than the flat rate special access line charge for use of similar facilities. This fact has provided much of the impetus for service bypass in which high volume customers substitute special access for switched access. Implementation of SLCs results in flat rate recovery of a portion of NTS costs directly from end users, and reduces the differential in the pricing of switched and special access lines. However, AT&T estimates that after full implementation of our access charge plan, approximately half of the interstate NTS cost allocation will still be recovered from the interexchange carriers on a nationwide average basis. BJA argues that flat rate recovery of a portion of NTS costs is inequitable because it ignores the fact that high volume customers receive more value from their telephone service than low volume users. Southwestern notes in its reply comments that BJA's proposal would lead to greater differences in the pricing of special and common access lines, increasing discrimination. Although a degree of pricing disparity will remain even after full implementation of our plan, this result is consistent with the need to balance all of our goals in this proceeding.

D. Bypass

47. The record in this proceeding has not yet been fully developed concerning bypass. At present, we have established an historical baseline for bypass data with the initial reports which included all bypass experienced to date. Successive reports which are important to our analysis will include new bypass-related activity. This analysis is designed to include an evaluation of successive changes in bypass activity which will be included on the three reporting forms which were published in the December 1987 request. In recommending the present plan, we concluded that price was a determinant factor in customer decisions to bypass the public switched network, and that reducing the CCL charge would reduce the incentives for uneconomic bypass.[23] Thus, we anticipated that further implementation of SLCs would help to deter bypass.

While a number of parties raise questions concerning precisely how we should attempt to measure the extent of uneconomic bypass, we do not believe that these technical issues need to be resolved here. There has not been sufficient time to develop comprehensive bypass information, and at this time there are limits to the degree of precision that can be achieved.

48. Despite this, we continue to believe that price is a contributing factor in customer bypass decisions. As we stated in making our March 1987 recommendations, "(t)he economic incentives for bypass by high volume users are incontrovertible when switched access is priced above cost and special access or other bypass services are priced at cost."[24] We recognize that price is not the only factor considered in bypass decisions. Although BRI criticizes our bypass conclusions, its own user survey shows that price was rated 8.4 on a scale of one to ten in importance for customer bypass decisions.[25] While this highly critical study rated price as far from the most important factor in bypass decisions, this rating still indicates that it is an important consideration. The BRI filing may also be interpreted as supporting Southwestern's contention that a lower price for the bypass alternative is a necessary, but not always sufficient, element in triggering bypass.

49. The record also documents the existence of significant bypass activity in certain areas. Because we do not yet have a lengthy time series of bypass data in quantitative form, it is too early to estimate the magnitude of the effect that our access charge program has had in this area. The September 1988 Monitoring Report, however, does not contradict our initial assumption that the reductions in the CCL charge will have the effect of reducing bypass. Although complete information is not yet available, Chart 6.1 in that report appears to show that there was a drop in new bypass activities from 1986 to 1987. Our improved format for monitoring bypass should enable us to evaluate this drop and whether, as the record to date suggests, our access charge plan is having its intended effect in reducing bypass. Numerous parties have submitted bypass studies in this proceeding. We encourage the parties to continue to submit bypass studies and analysis.

50. As previously indicated, we do not believe that it is necessary to resolve the technical measurement issues at this time. We do find, however, that the basic format of the bypass reports developed by our staff as part of our monitoring effort are appropriate. Although this reporting form was carefully developed after extensive public comment, we recognize that improvements may be possible. Accordingly, we ask the Joint Board staff to develop any modifications in the procedures for estimating bypass or the format of the bypass reports that they believe are appropriate. In this regard, however, we note that we expect to create a time series of bypass data over the course of our five-year monitoring program, and that any significant changes in the way bypass is measured would make comparisons over time less meaningful.

V. CONCLUSION

51. The record in this proceeding shows that the implementation of our March 1987 recommendations on NTS cost recovery has not produced any adverse or unanticipated results that are contrary to the public interest. While critics of our plan allege that SLCs undermine universal service, the record to date does not support this contention. On a nationwide basis, subscribership has increased, and we believe that the lifeline and Link-Up assistance programs made possible as part of SLC implementation have contributed to this gain. As previously indicated, we recognize that there are state by state variations in subscribership levels, and urge full implementation of lifeline and Link-Up assistance in order to increase telephone penetration. Further, the CCL charge reductions accompanying the SLC increases have decreased interstate toll rates, and this reduction, along with a generally expanding economy, has significantly increased the rate of growth in switched access traffic. The record also supports our conclusion that the next scheduled SLC increase is a necessary step for the successful implementation of the pooling modifications that we have recommended. The record shows that the reduction in the CCL charge has also reduced service price discrimination by reducing the differences between switched and special access line cost recovery. The present record and current data do not contradict our initial conclusions that price is a contributing factor in customer decisions to bypass, and that bypass is perceived to be a significant problem by some of the commentors. Our review of these factors leads us to conclude that the effects of our carefully integrated package of recommendations for resolution of the issues concerning NTS cost recovery have not been detrimental to the public interest and are in accordance with our expectations. Thus, we recommend no revision to our comprehensive package.[26]

52. We will conduct another 90-day study prior to implementation of the final steps in our access charge plan on April 1, 1989. We emphasize that continued monitoring is a vital part of our recommendations concerning NTS cost recovery, and we remain ready to recommend re-evaluation of this plan if the information gathered in the monitoring Docket reveals unanticipated effects contrary to the public interest.

53. Accordingly, this Joint Board recommends that the Commission submit this report to the National Association of Regulatory Utility Commissioners and to the Congress.

54. We also recommend that all jurisdictions take full advantage of the federal benefits made available through the lifeline and Link-Up America programs, and that jurisdictions participating in these programs eliminate noneconomic restrictions on eligibility for assistance.[27]

55. Parties wishing to participate in our second 90-day study should file an original and 5 copies of their comments with the Commission Secretary no later than **December 9, 1988.** Interested parties should file an original and 5 copies of their replies or further comments with the Secretary on or before **January 17, 1989.** To facilitate review of these filings by us and the public, we also ask the parties to serve their filings on the members and staff of this Joint Board (list attached), and to provide copies of all materials filed in this docket to the Public Reference Room of the Common Carrier Bureau's Industry Analysis Division.

FEDERAL COMMUNICATIONS COMMISSION
For the Federal-State Joint Board

Donna R. Searcy
Secretary

ATTACHMENT

SERVICE LIST

All items filed in CC Docket No. 87-339 must be filed with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554, and the following Commissioners and staff members:

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FOOTNOTES

[1] MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 2 FCC Rcd 2324 (1987) (*NTS Recovery Recommendation).*

[2] MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 2 FCC Rcd 2953 (1987). Subsequent to the *NTS Recovery Order*, several parties filed petitions for reconsideration addressing various matters including the level and timing of changes in subscriber line charges. In an order released July 12, 1988 (*NTS Recovery Reconsideration),* the Commission generally denied the requests to modify the NTS plan adopted by the Commission. MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 3 FCC Rcd 4543 (1988).

[3] The scheduled dates of the final two SLC increases are December 1, 1988 (60 cent increase), and April 1, 1989 (30 cent increase). These increases will result in a cap of3.50 for the residential and single-line business SLC in April 1989. Multiline business users have been paying SLCs capped at6.00 since May 1984. Study areas with NTS loop costs below that cap have their SLC capped at the actual cost level.

[4] MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, and Establishment of a Program to Monitor the Impact of Joint Board Decisions, CC Docket Nos. 78-72 and 80-286, 2 FCC Rcd 3298 (1987) (*Monitoring Recommendation).*

[5] Establishment of a Program to Monitor the Impact of Joint Board Decisions, CC Docket No. 87-339, 2 FCC Rcd 5266 (1987) (*MonitoringOrder).*

[6] Parties filing comments were American Telephone and Telegraph Company (AT&T), Ameritech Operating Companies (Ameritech), Bell Atlantic Telephone Companies (Bell Atlantic), Institutional Communications Company (ICC), National Association of State Utility Consumer Advocates (NASUCA), Public Service Commission of the District of Columbia (DCPSC), Teleport Communications (Teleport), United States Telephone Association (USTA), and Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company (US West). Parties filing reply comments were Ameritech, Bell Atlantic, DCPSC, USTA, US West, BellSouth Telephone Companies (BellSouth), State of Connecticut Office of Consumer Counsel (Connecticut), Contel Corporation (Contel), GTE Service Corparation and GTE Telephone Companies (GTE), Kenneth C. Springirth (Springirth), Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO), Pacific Bell and Nevada Bell (Pacific Telesis), United Telecommunications, Inc. (United), NYNEX Telephone Companies (NYNEX), Southwestern Bell Telephone Company (Southwestern), and National Rural Telecom Association, National Telephone Cooperative Association, et al (NRTA/NTCA). The material filed by Springirth was labeled as a Petition. Because the petition was filed within the period for replies, we will construe it as such.

[7] *NTS Recovery Recommendation*, para. 46.

[8] The aggregate data provided by AT&T indicate that the estimated proportion to be paid by the interexchange carriers is 55% for 1988, 47% for 1989, and 46% for 1990 and 1991.

[9] MTS and WATS Market Structure, CC Docket No. 78-72, *Third Report and Order*, 93 FCC 2d 241 (1983).

[10] MTS and WATS Market Structure and Amendment of Part 67 of the Commission's Rules, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 48325 (1984).

[11] 2 FCC Rcd at 2324.

[12] 2 FCC Rcd 3298 (1987).

[13] 2 FCC Rcd 2953 (1987).

[14] 2 FCC Rcd 5266 (1987).

[15] September 1988 Monitoring Report at 20.

[16] Public Service Commission of the District of Columbia, comments and data submission, May 2, 1988, section 5 at 4-5.

[17] September 1988 Monitoring Report at 23-24.

[18] We note that, as of the date of our September Monitoring Report, twenty four states and the District of Columbia had been certified by the FCC to provide lifeline assistance, and that thirty one states and the District of Columbia had been certified to provide Link-Up assistance.

[19] In this regard, we note that we are presently considering requests for broadened eligibility standards for Link-Up assistance.

[20] In its discussion of the relation between SLCs and increases in toll traffic, BJA fails to acknowledge the implementation of the multiline business SLC in May 1984, although it is not clear how much this affects its conclusions.

[21] Comments of USTA, reply comments of NRTA/NTCA, OPASTCO, USTA, Ameritech, Contel, GTE, NYNEX, Pacific Telesis, and United.

[22] 2 FCC Rcd at 2338.

[23] 2 FCC Rcd at 2329.

[24] 2 FCC Rcd at 2329.

[25] Bethesda Research Institute Ltd., Bypass and the Subscriber Line Charge, August 1988, Chart 5.

[26] In light of these conclusions and our decision not to revise our NTS recovery plan at this time, the requests for altering the plan filed by Springirth and NASUCA are denied.

[27] We make these recommendations pursuant to Sections 1, 201 through 205, 221 (c), and 410 (c) of the Communications Act of 1934 as amended, 47 U.S.C. §§ 1, 201-205, 221 (c), & 410 (c).

CONCURRING STATEMENT OF COMMISSIONER RONALD L. LEHR

Monitoring the effects of subscriber line charges (SLCs) addresses what happened when costs were shifted to end users. The burden of proving clearly adverse effects or unanticipated harm was placed on those objecting to the increased SLCs, although those who participated in placing this burden differ in their views of it. In my view the burden of proving that subscriber line charges should be increased should be on the proponents of the change, as it normally is in rate proceedings. If the burden of proof were on the proponents of the increases in the SLCs, in

my view, the record would no more support the added charges than it proves the lack of clearly adverse effects or unanticipated harm. In addition, I believe that showing clearly adverse effects or unanticipated harm is a very stringent standard, proof of which is not shown on the record of the monitoring docket at this time.

Most of the findings in the report cite a lack of evidence showing adverse effects or unanticipated harm. In monitoring such complex policy designed to address very complicated issues, it is no surprise that the nexus between causes and effects monitored has not been shown. The questions have not been precisely framed; the analysis of the filed data has not yet been sufficiently rigorous. For example, while we have some baseline data on bypass, no one has consensus definitions and no one has shown a high degree of statistical correlation between subscriber line charges and bypass. Data in the docket about network efficiency are primitive at best, consisting mainly of assertions. State regulators and all ratepayers eagerly await the flow-through of efficiencies from depooling in decreased local rates. There is no evidence of this effect on the record now. The relationship between subscriber line charges and the penetration data has not been distinguished from the effects of the general economic recovery. Jurisdictional shifts simply will not be known with certainty until 1988 books are closed and are analyzed, if then. The data in the monitoring docket have not yet been subjected to enough hard scrutiny. The questions about what happened when subscriber line charges were increased remain before us.

The process of monitoring and reporting needs to be changed. I concur in the comments of the Colorado PUC emphasizing the need for better analysis and less paper shuffling. The process must be made easier for all parties by improving the format and graphics of the reports, reducing the quantity of repetitous information generated, and improving the focus on critical issues. The process for gathering, sharing, and analyzing monitoring information should be, and can be, greatly improved.

With these statements, I join in the report.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-266

In the Matter of

TELEPHONE COMPANY-
CABLE TELEVISION
Cross-Ownership Rules,
Sections 63.54 - 63.58.

ORDER

Adopted: November 25, 1988; Released: November 25, 1988

By the Chief, Common Carrier Bureau:

1. The Community Antenna Television Association (CATA) and the National Association of Broadcasters (NAB) have filed requests for a further extension of time of thirty days to file comments in response to the *Further Notice of Inquiry and Notice of Proposed Rule Making*, CC Docket 87-266, FCC 88-249, released September 22, 1988 (*Further Notice*). That decision tentatively concluded, among other things, that telephone companies should no longer be barred from providing video programming in their telephone service areas provided that they meet certain regulatory conditions. Comments and reply comments are currently due on December 1, 1988, and December 28, 1988, respectively. The National Cable Television Association (NCTA) and the Cable Television Operators and Associations (CTOA) have filed comments in support of the CATA request. The United States Telephone Association (USTA) has filed an opposition to the requests.

2. CATA states that the separate statement in this proceeding of Commissioner Patricia Diaz Dennis, released November 16, 1988, underscores a number of issues of importance in this proceeding, some of which were not raised in the *Further Notice*. An extension is needed, states CATA, so that interested parties can include in their comments full consideration of the issues and concerns raised by Commissioner Dennis. NAB states that the additional requested time will allow interested parties an adequate opportunity to evaluate the critical issues raised by the separate statement of Commissioner Dennis. NCTA states that the Commissioner's statement poses a fundamental challenge to the analysis that led the Commission to its tentative conclusion in the *Further Notice* and asks for comment on significant issues not directly raised in the *Further Notice*. Grant of the requested extension, states NCTA, is necessary to afford interested persons a reasonable opportunity to incorporate in their comments the ideas and policy conclusions of Commissioner Dennis. CTOA states that it supports the CATA request for the reasons stated by CATA. USTA states that current due dates provide a generous opportunity to comment and strongly objects to any extension.

3. It is the policy of this Commission that extensions of time shall not be routinely granted.[1] However, in light of the parties' expressed need to rely on important, additional information that has been only recently released,[2] we acknowledge that the public interest would be served by granting additional time to permit the parties to this proceeding to prepare their comments. However, contrary to the requests, we conclude that an approximate two week extension is sufficient time for parties to prepare comments.

4. Accordingly, IT IS ORDERED, that the requests for an extension of time filed by the Community Antenna Television Association and the National Association of Broadcasters ARE GRANTED IN PART AND DENIED IN PART as specified herein. Comments are due on or before **December 16, 1988** and reply comments are due on or before **January 11, 1989.**

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] 47 C.F.R. § 1.46(a).

[2] Separate Statement of Commissioner Patricia Diaz Dennis, CC Docket 87-266, Mimeo No. 531, released November 16, 1988; *Through the Looking Glass:* Integrated Broadband Networks, Regulatory Policies, and Institutional Change, OPP Working Paper No. 24, November 23, 1984.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-537

In the Matter of

New England Telephone and
Telegraph Company
Tariff F.C.C. No. 40
Transmittal No. 930

New York Telephone Company
Tariff F.C.C. No. 41
Transmittal No. 913

ERRATUM

Released: December 8, 1988

By the Chief, Common Carrier Bureau:

1. In the Order adopted by the Common Carrier Bureau in the above-captioned proceeding, New England Telephone and Telegraph Company and New York Telephone Company, DA 88-1757, released November 4, 1988, the Bureau inadvertently omitted a docket number for citation and identification purposes. For future reference to this proceeding, the docket number to be used is CC Docket No. 88-537.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY — File No. I-T-C-89-001

Application for authority to acquire and operate facilities for service to Guatemala.

ORDER AND AUTHORIZATION

Adopted: November 22, 1988; Released: December 8, 1988

By the Chief, International Facilities Division:

1. The above-captioned application, filed on October 7, 1988 by American Telephone and Telegraph Company (AT&T), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease, activate and operate facilities in the Mexican Microwave System for service to Guatemala. The application was placed on public notice on October 12, 1988. No comments were received. Upon consideration of the application, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C- 89-001 IS GRANTED, and AT&T is authorized to:

a. lease from Telefonos de Mexico, S.A. (TELMEX) a one-half interest in 120 voice-grade circuits in the Mexican Microwave System between the U.S./Mexico border and the Mexico/Guatemala border; and

b. activate and operate said facilities to provide AT&T's regularly authorized services between the U.S. and Guatemala.

3. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between AT&T and its correspondent in Guatemala, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

4. This authorization is effective on its adoption date and shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

5. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HUGHES COMMUNICATIONS GALAXY, INC.

File No. I-T-C-87-167

For authority to make available channels of communication via the Hughes Communications Galaxy, Inc. Satellites Galaxy II and Galaxy III for transmissions to various transborder locations.

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: November 22, 1988; Released: December 8, 1988

By the Chief, International Facilities Division:

1. On October 12, 1988, Hughes Communications Galaxy, Inc. (Hughes) filed a letter with the Commission requesting expedited treatment of a portion of application File No. I-T-C-87-167 submitted August 21, 1987. In its original application, Hughes requested authority to provide a full range of transborder services, including two-way services, to Latin American/Caribbean locations which have not been consulted under Article XIV(d) of the INTELSAT Agreement. In its request for expedited treatment, Hughes seeks authority to utilize transponders on its Galaxy II and Galaxy III satellites for the provision of two-way services between the United States and Canada and Mexico, and one-way video, audio, and data services between the U.S. and specified Latin American and Caribbean countries consistent with existing INTELSAT Article XIV(d) consultations.[1] On November 3, 1988, Pan American Satellite (PAS) submitted comments.[2]

2. In 1981, following consultations with the Department of State, the Commission gave initial approval for use of U.S. domestic satellites for the transmission of certain international telecommunications services to points within the footprint of those satellites. The Commission determined that domestic satellites could be used for these services where INTELSAT is incapable of providing a service or where it would be clearly uneconomical or impractical to use the INTELSAT system for that service. The Commission stated that applications meeting this standard could not be implemented until: 1) the concurrence of the appropriate governmental entities had been obtained; 2) the consultation requirement of INTELSAT Article XIV(d) had been fulfilled; and 3) the Chief, Common Carrier Bureau issued an order authorizing implementation of service. In its *Transborder I* decision, [3] the Commission concluded that where a domestic satellite network is already in place that can be accessed in a transborder location with the addition of a small, receive-only earth station, it would be uneconomical and impractical for that country to utilize the INTELSAT system when it can reach the domestic network for little or no cost. The alternative method of using INTELSAT facilities would involve significant additional costs due to multi-satellite hops and the use of additional terrestrial facilities. In addition, the Commission found that the use of the INTELSAT system to duplicate programming already available on domestic satellites would be an inefficient use of the available radio spectrum.

3. The Commission has made similar findings with respect to the business services between the U.S. and Canada and Mexico. The Commission noted that the global system has not been used for traffic between the U.S. and Canada and Mexico. It found that service via INTELSAT would be uneconomical and impractical since it would involve 1) higher costs necessary to duplicate networks already in place; 2) higher costs and inefficiency associated with multi-satellite hops and terrestrial links which would be required to extend transmission to a customer's premises; and 3) an inefficient use of the available radio spectrum.

4. In the instant application, Hughes requests authority to provide satellite services to points in Latin America, the Caribbean, Canada and Mexico via its Galaxy II and Galaxy III satellites. On December 4, 1987, the Commission granted Hughes authority to utilize seven transponders on Galaxy III for the transmission of television programming to various transborder locations.[4] It now seeks to extend this authority to the remaining transponders on Galaxy III. In addition, Hughes seeks to use its Galaxy II satellite for the provision of transborder services consistent with existing INTELSAT consultations. The Commission has concluded on previous occasions that use of domestic satellites for the provision of services similar, if not identical, to those proposed, here is consistent with established transborder policy. We find that Hughes' request is in accord with current INTELSAT Article XIV(d) consultations and therefore will cause neither technical interference nor significant economic harm to the global system. We note, however, that consultations have not been completed for use of the Galaxy II satellite for service to Canada. Thus, we will authorize the operation of Galaxy II only for the provision of receive-only services to points in Mexico, Latin America and the Caribbean. Since all prerequisites for the issuance of final authority have been met with respect to these points, we conclude that grant of the instant request will serve the public interest. Moreover, since the services proposed in Hughes' request for expedited treatment are consistent with existing INTELSAT consultations, PAS has indicated that it has no objection.

5. Accordingly, IT IS ORDERED that application File No. I-T-C- 87-167 IS GRANTED IN PART, and Hughes may utilize all transponders on its Galaxy III satellite for the provision of two-way service between the U.S. and Canada and Mexico and all transponders on its Galaxy II and III satellites for the provision of one-way services from the U.S. to Anguilla, Antigua and Barbuda, the Bahamas, Barbados, Bermuda, the British Virgin Islands, the Cayman Islands, Colombia, Costa Rica, Dominica, the Dominican Republic, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Montserrat, the Netherlands Antilles, Panama, St. Kitts-Nevis, St. Lucia, Trinidad and Tobago, the Turks and Caicos Islands and Venezuela, consistent with Attachments 1 and 2, without any further action by the Commission.

6. IT IS FURTHER ORDERED that those portions of Hughes' application involving: 1) two-way services to points other than Canada and Mexico; 2) the use of the Galaxy II satellite for service to Canada; and 3) service to locations not previously consulted under Article XIV(d) of the INTELSAT Agreement ARE HEREBY DEFERRED until further action by the Commission.

7. This authorization constitutes the final step for the provision of transborder services through domestic satellites only insofar as the U.S. regulatory process is concerned. It does not, however, dispense with any requirements that may be imposed by the other country involved.

8. This order shall not be construed as authorizing the distribution of programming where the appropriate copyright clearances have not been obtained.

9. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be requested within 30 days of the date of public notice of this order (*see* Section Rule 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] Specifically, Hughes requested authority to serve the following Caribbean and Latin American locations: Anguilla, Antigua, the Bahamas, Barbados, Barbuda, Belize, Bermuda, the British Virgin Islands, the Cayman Islands, Colombia, Costa Rica, Dominica, the Dominican Republic, Ecuador, El Salvador, Grenada, Guadeloupe, Guatemala, Haiti, Honduras, Jamaica, Martinique, Montserrat, the Netherlands Antilles, Nicaragua, Panama, St. Kitts-Nevis, St. Lucia, Trinidad and Tobago, the Turks and Caicos Islands and Venezuela.

[2] PAS stated it has no objection to approval of Hughes' request, so long as the Commission limits the grant to the provision of one-way video services from the United States and two-way business services between the United States and Canada and Mexico. On October 2, 1987, PAS filed a Petition to Deny the application in question on the ground that domestic satellite operators seeking authority to provide two-way transborder services should be treated in the same manner as separate system operators.

[3] Transborder Satellite Video Services, 88 F.C.C. 2d 258 (1981).

[4] *See* U.S. Satellite Corporation, 2 FCC Rcd 7185 (1987).

ATTACHMENT 1

U.S. Satellites Consulted Pursuant to Article XIV(d)

Satellites

*FEDEX A
*FEDEX B
GALAXY I
*GALAXY II
GALAXY III
*GALAXY IV
*GALAXY B
GSTAR I
GSTAR II
*GSTAR III
*COMSTAR III
COMSTAR D-4
*COMSAT GEN B
SPACENET I
*SPACENET II
SPACENET III
SATCOM IR
*SATCOM IIR
SATCOM IIIR
SATCOM IV
SATCOM V
SATCOM K-1
*SATCOM K-2
SBS V
SBS I
SBS II
SBS III
**SBS IV
TELSTAR 3A
TELSTAR 302
*TELSTAR 303
CONTEL ASC-I
CONTEL ASC-II
WESTAR IV
WESTAR V
*WESTAR B
*WESTAR (79° W)

* Consulted for Latin America/Caribbean services only. Includes receive-only video programming from the U.S. to Mexico.

** Consulted for Canada and Latin America/Caribbean services only.

ATTACHMENT 2

SUMMARY OF INTELSAT CONSULTATION

Country	Service[s]	Satellite[s]
Anguilla	T.V. and audio receive-only	all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1
Antigua and Barbuda	T.V., audio and data receive-only	all satellites listed in Attachment 1
Bahamas	T.V., audio and data receive-only	all satellites listed in Attachment 1
Barbados	T.V. receive-only	all Galaxy, Satcom and Westar satellites listed in Attachment 1
Belize	T.V., audio and data receive-only	all satellites listed in Attachment 1
Bermuda	T.V. and audio receive-only	all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1
British Virgin Islands	T.V. and audio receive-only	all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1
Canada	occasional pt.-to-pt. and full time video services and business services (including data and electronic document distribution, video teleconferencing and voice communications)	all satellites listed in Attachment 1 plus ANIK B, C1, C2, C3, D1 and D2
Cayman Islands	T.V. and audio receive-only	all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1

Colombia	T.V. receive-only	Galaxy I and III, Satcom IR, IIIR, IV and V, Westar IV, Westar V and Westar (269E)
Costa Rica	T.V. receive-only	all satellites listed in Attachment 1
Dominica	T.V., audio and data receive-only	all satellites listed in Attachment 1
Dominican Republic	T.V., audio and data receive-only	all satellites listed in Attachment 1
El Salvador	T.V. receive-only	all satellites listed in Attachment 1
Grenada	T.V., audio and data receive-only	all satellites listed in Attachment 1
Guatemala	T.V. and audio receive-only	all satellites listed in Attachment 1
Haiti	T.V., audio and data receive-only	all satellites listed in Attachment 1
Honduras	T.V. receive-only	all satellites listed in Attachment 1
Jamaica	T.V., audio and data receive-only (See note 3)	all satellites listed in Attachment 1
Mexico	Full-time and occasional T.V. services, receive-only audio and business services (including data and electronic document distribution, video teleconferencing and voice communications)	all satellites listed in Attachment 1 plus the Morelos I and II satellites
Monsterrat	T.V., and audio receive-only	all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1
Netherlands Antilles	T.V. receive-only	Galaxy I, Satcom III-R and IV,

		Westar IV and V and Comstar D4
Panama	T.V., audio and data receive-only	all satellites listed in Attachment 1
St. Christopher-Nevis	T.V., audio and data receive-only	all satellites listed in Attachment 1
St. Lucia	T.V., audio and data receive-only	all satellites listed in Attachment 1
St. Vincent and the Grenadines	T.V., audio and data receive-only	all satellites listed in Attachment 1
Trinidad and Tobago	T.V. receive-only	all Galaxy, Satcom, Westar and Comstar satellites listed in Attachment 1
Turks & Caicos	T.V. and audio receive-only	all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1
Venezuela	T.V. receive-only	all satellites listed in Attachment 1

Notes

1) With the exception of Mexico and Canada, which were consulted separately, all services (i.e. T.V., audio and data receive-only) can be provided to any point over any of the satellites listed in Attachment 1 even through only certain services and satellites were initially requested. This can be accomplished through notifying INTELSAT with no additional consultation required.

2) Attachment 1 contains only those satellites that have been technically consulted with INTELSAT.

3) All services authorized to Latin American/Caribbean locations are receive-only (i.e. can be received as a by-product of or incidental to U.S. domestic transmissions).

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 87-24

In the Matter of

Amendment of Parts 73 and 76
of the Commission's Rules
Relating to Program Exclusivity
in the Cable and Broadcast Industries

ORDER GRANTING MOTIONS FOR EXTENSION OF TIME FOR FILING COMMENTS

Adopted: November 30, 1988; Released: December 2, 1988

By the Chief, Mass Media Bureau

1. On October 13, 1988, the Commission adopted a *Further Notice of Proposed Rule Making* (*Further Notice*), 3 FCC Rcd 6171, in the above-captioned proceeding. This *Further Notice* addresses possible changes in a number of rules relating to the ability of television broadcasters to obtain exclusive rights in the programming they purchase *vis - a - vis* cable television systems carrying distant broadcast signals and against other television broadcast stations. The deadlines for filing comments and reply comments in this proceeding are December 12, 1988, and December 27, 1988, respectively.

2. On November 22, 1988, Southern Broadcast Corporation of Sarasota and WMUR-TV, Inc., filed a joint petition requesting that the time for filing comments in this proceeding be extended to January 26, 1989. On November 29, 1988, United Communications Corp. submitted a motion for extension of time to file comments also asking the Commission to extend the comment deadline to January 26, 1989. Petitioners indicate that more time is needed to collect and evaluate the extensive data sought by the Commission and to respond to the range of issues raised in the *Further Notice*.

3. As set forth in Section 1.46 of the Commission's rules, 47 CFR §1.46, it is our policy that extensions of time for filing comments in rule making proceedings shall not be routinely granted. However, we note that the *Further Notice* raises numerous issues concerning several different program exclusivity rules and therein we specifically state our desire for additional information to develop a comprehensive record before deciding these matters. Thus, it appears reasonable to provide parties with sufficient time to compile the data needed to analyze these issues. However, given our desire to conclude this proceeding as expeditiously as possible, we will grant a more limited extension than that requested by the petitioners. Therefore, we will extend the deadline for filing comments to January 17, 1989, and the deadline for replies to February 3, 1989.

4. Accordingly, IT IS ORDERED, that the joint petition for extension of time filed by Southern Broadcast Corporation of Sarasota and WMUR-TV, Inc., and the motion for extension of time to file comments filed by United Communications Corp. ARE GRANTED to the extent specified in paragraph 3, *supra*. IT IS FURTHER ORDERED that the time for filing comments and reply comments in this proceeding ARE EXTENDED to January 17, 1989, and February 3, 1989, respectively.

5. This action is taken pursuant to authority found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, and Sections 0.204(b), 0.283, and 1.45 of the Commission's rules.

6. For further information concerning this proceeding, contact Marcia Glauberman, Policy and Rules Division, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION:

Alex D. Felker
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-161

In the Matter of

Amendment of Part 22 of the
Commission's Rules to Revise
Certain Filing Procedures for
Mobile Services Division
Applications and to eliminate
Form 430

ERRATUM

Released: December 9, 1988

The Report and Order, FCC 88-339, released November 16, 1988, in the above-captioned matter is corrected to read as follows:

APPENDIX B

AMENDED RULES SECTION

* * * * *

4. Section 22.11(a) is revised as follows:

* * * * *

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-540

In the Matter of

Amendment of Section 73.202(b), RM-6546
Table of Allotments,
FM Broadcast Stations.
(Rapid City, South Dakota)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 10, 1988; Released: December 8, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making and request for expedited action filed by Tom-Tom Communications, Inc. (petitioner), requesting the substitution of Channel 281C1 for Channel 282C at Rapid City, South Dakota, and the modification of its permit to specify the substitute channel. Petitioner states that the substitution of channels could enable it avoid interference problems with the aeronautical frequencies being used in the Rapid City area. Channel 281C1 can be allotted to Rapid City in compliance with the Commission's minimum distance separation requirements with a site restriction of 6 kilometers (3.7 miles) southwest to accommodate petitioner's desired transmitter site.[1]

2. Petitioner states that an air hazard issue was directed against its application for the construction permit it now holds because the Commission's Antenna Survey Branch had not received notification of approval from the Federal Aviation Administration (FAA) prior to designating the competing applications for hearing. It states that this approval was withheld because the FAA predicted that interference might be caused to aeronautical frequencies from the use of Channel 282C anywhere in the Rapid City area, but not because the proposed tower site would constitute a hazard to air navigation. After negotiating a settlement with the other parties in the comparative hearing, petitioner states that it also negotiated a settlement with the FAA by committing to take whatever actions were necessary to correct interference to aeronautical frequencies which might occur from use of Channel 282. This settlement, according to petitioner, was achieved only through the intercession of the Commission and FAA headquarters officials in the negotiations between Tom-Tom and the FAA regional office. However, it believes that the FAA continues to anticipate that interference will result from the use of Channel 282C in the Rapid City area and thus finds itself in a position where it may expend considerable sums to construct its facilities only to later be required to abandon them. Based on further study and consultation with the FAA, it believes it could avoid or substantially reduce the possibility of interfence to aeronautical frequencies if Channel 281C1 is substituted for Channel 282C. In addition, petitioner claims that use of Channel 281C1 will enable it to construct the tower at its originally proposed Skyline Drive site where a number of other towers are already located, thus reducing any additional hazard to air navigation.[2] According to the petitioner, the ability to erect a tower at the Skyline Drive site, where other towers are already located, will enable it to complete construction and commence operation sooner, thus more quickly providing a new service to the area.

3. We believe the public interest would be served by proposing the substitution of Channel 281C1 for Channel 282C at Rapid City, since it could obviate the potential for interference to air navigation and promote the rapid initiation of additional service to the area. As requested, we shall also propose to modify petitioner's construction permit to specify Channel 281C1 in lieu of its present Channel 282C.

4. Accordingly, based on the above discussion, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Rapid City, South Dakota	230C1, 250C1, 262C1, 282C	230C1, 250C1, 262C1, 281C1

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 30, 1989,** and reply comments on or before **February 14, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Michael L. Glaser, Esq.
Joseph P. Benkert, Esq.
Gardner, Carton & Douglas
Republic Plaza
370-17th Street, Suite 2200
Denver, Colorado 80202-3520

and

1001 Pennsylvania Avenue, N.W., Suite 750 N
Washington, D.C. 20004

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See , Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for this allotment are North Latitude 44-01-50 and West Longitude 103-15-34.

[2] Use of this site with full Class C facilities was not approved by the FAA upon a finding that the proposed tower height would exceed the location's maximum permissible height.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-71

In the Matter of

Amendment of Section 73.202(b),	RM-6165
Table of Allotments,	
FM Broadcast Stations.	
(Manchester, Ohio)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 8, 1988; Released: December 9, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Ohio Kentucky Radio Company (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 1014 (1988), proposing the allotment of Channel 267A to Manchester, Ohio, as the community's first local FM service. Petitioner and Southern Ohio Christian Broadcasting Company (Southern) filed comments supporting the allotment. Each stated their intention to apply for Channel 267A, if allotted to Manchester. No other comments were received.

2. We believe the public interest would be served by allotting Channel 267A to Manchester, Ohio, since it could provide the community with its first local FM service. Channel 267A can be allotted to Manchester in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 23, 1989**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Manchester, Ohio	267A

3. The window period for filing applications will open on **January 24, 1989**, and close on **February 23, 1989.**

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau,. (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 38-41-18 and West Longitude 83-36-24.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-70

In the Matter of

Amendment of Section 73.202(b), RM-6163
Table of Allotments,
FM Broadcast Stations.
(Lincoln City, Oregon)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 8, 1988; Released: December 9, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Matrix Media, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 1012 (1988), proposing the substitution of Channel 244C2 for Channel 244A at Lincoln City, Oregon, and the modification of petitioner's license for Station KCRF to specify operation on the higher powered channel. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 244C2 for Channel 244A at Lincoln City since it could provide the community and its environs with expanded radio service. Channel 244C2 can be allotted to Lincoln City in compliance with the Commission's minimum distance separation requirements and can be used at Station KCRF's present transmitter site.[1] As proposed, we shall also modify petitioner's license for Station KCRF to specify operation on Channel 244C2 in lieu of its present Channel 244A.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 23, 1989**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Lincoln City, Oregon	244C2

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Matrix Media, Inc. for Station KCRF, Lincoln City, Oregon, IS MODIFIED, effective **January 23, 1989**, to specify operation on Channel 244C2, in lieu of Channel 244A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 44-52-30 and West Longitude 123-59-03.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-68

In the Matter of

Amendment of Section 73.202(b), RM-6187
Table of Allotments,
FM Broadcast Stations.
(Riverside, Pennsylvania)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 8, 1988; Released: December 9, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Victor A. Michael, Jr. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 1003 (1988), proposing the allotment of Channel 222A to Riverside, Pennsylvania, as the community's first local FM service. Comments supporting the allotment were filed by the petitioner and by Ronald F. Balonis. Petitioner restated his intention to apply for Channel 222A, if allotted to Riverside. No other comments were received.

2. Channel 222A can be allotted to Riverside in compliance with the Commission's minimum distance separation requirements with a site restriction of 0.7 kilometers (0.5 miles) west to avoid a short-spacing to Station WMGS, Channel 225B, Wilkes-Barre, Pennsylvania.[1] Canadian concurrence in the allotment has been received since Riverside is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. We believe the public interest would be served by allotting Channel 222A to Riverside, Pennsylvania, since an interest in providing the community with its first local FM service has been expressed. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 23, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Riverside, Pennsylvania	222A

4. The window period for filing applications will open on **January 24, 1989, and close on February 23, 1989.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 40-57-18 and West Longitude 76-38-16.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-67

In the Matter of

Amendment of Section 73.202(b), RM-6178
Table of Allotments,
FM Broadcast Stations.
(Ogdensburg, New York)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 8, 1988; Released: December 9, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Timothy D. Martz (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 1005 (1988), proposing the allotment of Channel 254A to Ogdensburg, New York, as the community's second local FM service. Petitioner filed comments reiterating his intention to apply for the channel, if allotted. No other comments were received.

2. Channel 254A can be allotted to Ogdensburg in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.8 kilometers (3.0 miles) northeast to avoid a short-spacing to Channel 201A, Brockville, Ontario, and to Station CFLY-FM, Kingston, Ontario, Canada.[1] Canadian concurrence in the allotment has been received since Ogdensburg is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. We believe the public interest would be served by allotting Channel 254A to Ogdensburg, New York, since an interest has been expressed in providing the community with its second local FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 2, 1989** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

Channel No.	
Ogdensburg, New York	224A, 254A

4. The window period for filing applications will open on **January 24, 1989,** and close on **February 23, 1989.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 44-42-57 and West Longitude 75-26-50.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-320

In the Matter of

Amendment of Section 73.202(b), RM-6314
Table of Allotments,
FM Broadcast Stations.
(Russellville, Kentucky)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 10, 1988; Released: December 8, 1988

By the Deputy Chief, Policy and Rules Division:

1. Pursuant to the request of Target Communications of Kentucky, Inc., (petitioner), licensee of Station WBVR(FM), Channel 266C, Russellville, Kentucky, the Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 4228 (1988), proposing to downgrade the facilities for Station WBVR(FM) by substituting Channel 266C1 for Channel 266C at Russellville. Petitioner also requested modification of its station's license to specify operation on the lower class C1 channel. Supporting comments were filed by the petitioner reaffirming its intention to promptly construct the new facilities. No other comments were received.

2. Channel 266C1 can be allotted to Russellville, Kentucky, as a substitute for Channel 266C, consistent with the Commission's minimum distance separation requirements with a site restriction of 2.8 kilometers (1.7 miles) west of the city. Petitioner will utilize it's current transmitter site for Channel 266C1.[1]

3. In view of the fact that Target's proposal would result in enhanced spectral efficiency by making more spectrum available to other users, we believe the public interest would be served by the substitution of Channel 266C1 for Channel 266C at Russellville. In accordance with Section 1.420(g) of the Commission's Rules, we are herein modifying the license of Station WBVR(FM) to specify operation on Channel 266C1.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 23, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Russellville, Kentucky	266C1

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WBVR(FM), Russellville, Kentucky IS MODIFIED, to specify operation on Channel 266C1 in lieu of Channel 266C, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The coordinates for Channel 266C1 at Russellville are 36-50-40 and 86-55-11.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re application of

TEL-CAR CORPORATION — File No. 26330-CD-P-l-83

For a construction permit to establish additional one-way paging facilities for Station KUS268 in the Public Land Mobile Service (PLMS) at Ft. Lauderdale, Florida

MEMORANDUM OPINION AND ORDER

Adopted: November 14, 1988; Released: December 8, 1988

By the Chief, Common Carrier Bureau:

1. By Memorandum Opinion and Order, the Chief of the Mobile Services Division (MSD) granted the above-referenced application of Tel-Car of Hollywood, Inc. (Tel-Car) for an additional one-way facility, Station KUS268, at Ft. Lauderdale, Florida on frequency 158.70 MHz and denied a petition to deny filed by Gabriel Communications Corporation (Gabriel). *Tel - Car of Hollywood, Inc.*, Mimeo 5098, released June 11, 1986 (*Order*). On July 1, 1986, control of Gabriel was transferred to Crico Telecommunications of Southeast Florida, Ltd. (CRICO) and Gabriel's authorizations were assigned to CRICO. CRICO filed a petition for reconsideration of the *Order*. Tel-Car filed an opposition, and CRICO filed a reply.

BACKGROUND

2. In its petition to deny, Gabriel argued that Tel-Car's application was mutually exclusive with an application previously filed by Gabriel for a facility at Belle Glade, Florida on 158.70 MHz and that Tel- Car's application should have been dismissed as untimely filed under the cut-off rules. Tel-Car responded that its proposed facility at Ft. Lauderdale would be operated in accordance with a previously-contracted time-sharing agreement between Gabriel and Tel-Car in 1970,[1] and therefore would not cause interference to Gabriel's Belle Glade facility. Gabriel had contended that the 1970 time-sharing agreement did not apply to Gabriel's Belle Glade facility but was intended to apply only to the four locations listed in the agreement: Gabriel's facilities at Ft. Lauderdale and Boca Raton, Radio-Phone's facility at Ft. Lauderdale and Tel-Car's facility at Miami.[2]

3. In denying Gabriel's petition, the MSD noted that the agreement did not address whether the parties intended it to apply only to the transmitters listed in the 1970 agreement or to encompass a reasonable expansion of the respective stations. The MSD also noted that Gabriel had itself added facilities to the stations it had been operating pursuant to the time-sharing agreement and acknowledged the agreement's applicability to those stations even though they were not listed in the original agreement. *Order* at para. 4. Accordingly, the MSD concluded that Tel-Car's proposed facility constituted a "reasonable extension of its service which should be permitted under the umbrella of the original time-sharing agreement." *Id.* at para. 3 (footnote omitted).

4. In its petition for reconsideration, CRICO argues that its Belle Glade facility is not subject to the time-sharing agreement. CRICO emphasizes that although its predecessor, Gabriel, had expanded its service to include facilities not listed in the 1970 agreement, but which Gabriel conceded were covered by the agreement, those facilities were not operable independent of the facilities listed in the agreement. CRICO notes that, by contrast, the Belle Glade facility is operable independent of the facilities listed in the agreement and therefore is not subject to the agreement.

DISCUSSION

5. We reject CRICO's petition for reconsideration. The issue in this proceeding has been, and continues to be, whether the 1970 time-sharing agreement contemplated expansion by the contracting parties into locations not listed in the agreement. CRICO does not refute the MSD's conclusion or present any new facts or circumstances, but merely reiterates the arguments raised by Gabriel in its petition to deny that were considered and rejected by the MSD in its *Order*. Inasmuch as Gabriel itself expanded into areas not listed in the agreement and conceded that such expansion was subject to the agreement, we will not permit CRICO to prevent Tel-Car from similar expansion merely by filing an application which is independent of those listed in the 1970 agreement. [3] To limit the agreement's applicability in this manner would also have excluded CRICO's expansion into Jupiter, West Palm Beach and Miami. We do not believe that such a result would be in the public interest.

6. Accordingly, IT IS ORDERED, that the Petition for Reconsideration filed by Crico Telecommunications of Southeast Florida, Ltd. IS DENIED.

7. This order is issued under Section 0.291 of the Commission's rules and is effective on its release date. Applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] The agreement was originally between Abe Schonfeld, Gabriel, and Howard Hicks. Tel-Car succeeded to the interest of Schonfeld and Florida Radio-Phone Co. (Radio-Phone) succeeded to that of Hicks.

[2] CRICO has subsequently acquired Gabriel's authorizations, as noted above, as well as Radio-Phone's authorization at Ft. Lauderdale.

[3] In addition, Tel-Car cites a specific representation by Gabriel that his Belle Glade facility operates on a shared basis with Tel-Car pursuant to a time-sharing agreement, which Gabriel does ot rebut.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 87-390

In the Matter of

Amendment of Parts 2 and 22 of
the Commission's Rules to Permit
Liberalization of Technology and
Auxiliary Service Offerings in the
Domestic Public Cellular Radio
Telecommunications Service

REPORT AND ORDER

Adopted: October 13, 1988; Released: December 12, 1988

By the Commission: Commissioner Quello dissenting in part and issuing a statement.

TABLE OF CONTENTS

Title	Paragraph
INTRODUCTION	1
BACKGROUND	3
DISCUSSION AND DECISIONS	7
General	7
Technical Standards	10
Transmission Standards	10
Antenna Height-Power Requirements	17
Coordination	24
Equipment Authorization	31
Maintenance of Adequate	33
Cellular Service Compatibility	36
Existing Cellular Systems	36
Advanced Cellular Systems	46
Auxillary Common Carrier Services	54
Impact on Cellular Efficiency	54
Fixed Service	61
Paging Service	67
Dispatch Service	70
Secondary Status	78
REGULATORY FLEXIBILITY ACT – FINAL ANALYSIS	81
ORDERING CLAUSES	86
RULE CHANGES	88

INTRODUCTION

1. By this action the Commission amends its Table of Frequency Allocations and certain technical standards for the Domestic Public Cellular Radio Telecommunications Service. These amendments will provide a regulatory structure that will facilitate the implementation of a new generation of cellular technology and services while preserving conventional cellular service through existing equipment and technology. This structure will allow cellular radio carriers the option of introducing advanced cellular technologies and providing auxiliary common carrier services on a secondary basis in the radio spectrum allocated for cellular service.

2. We are allowing cellular licensees at their option to use portion of their spectrum to implement advanced cellular technologies or auxiliary common carrier services, provided several important conditions are satisfied. First, the cellular operator must continue to devote sufficient spectrum to conventional cellular service to satisfy demand. Second, all advanced technologies and auxiliary services will be secondary to conventional cellular service and must be under the control of the cellular licensee. Interference to conventional cellular service, if it occurs, must be corrected. Third, all nonconventional operations must be coordinated with all cellular operations within 75 miles. Fourth, while we are relaxing certain technical standards, such as those pertaining to channeling plans and modulation type, we are maintaining certain key requirements such as limitations on the signal strength at the cellular service area boundaries to ensure against interference. Finally, we are requiring a complete technical analysis of any potential interference before implementing advanced technology cellular or auxiliary services. We are also taking the opportunity in this item to relax restrictions on antenna height-power for cellular systems. These requirements are excessively restrictive and may in some instances result in increased costs to provide cellular service. However, dispatch service in the cellular spectrum will continue to be prohibited as required by statute. The actions taken herein will both preserve the viability of today's cellular service and foster the development of improved cellular service for the future.

BACKGROUND

3. To satisfy public radiotelephone needs nationwide in the early 1970s, the Commission allocated spectrum for a cellular radio service.[1] This service is based on the cellular concept of limiting transmission power in order to gain greater frequency reuse. This concept subdivides available channels into groups, which are assigned to base stations to serve mobile phones operating in areas called cells. Two or three cell diameters away, these channels are reused in another cell, thus promoting spectrum efficiency. Cellular systems are required to conform with a technical compatibility standard (OST 53)[2] that is designed to ensure that all mobile phones be required to work anywhere that a cellular system operates – a capability termed "roaming". [3] This standard has helped to create a truly nationwide service where mobile units can, with little difficulty, operate anywhere that cellular service is offered.

4. On September 17, 1987, the Commission adopted a *Notice of Proposed Rule Making* (Notice) initiating the instant proceeding.[4] There were several underlying considerations and objectives in issuing the proposal. The demand for cellular service continues to grow at a rapid rate. This demand will eventually saturate the capacity of cellular systems in the largest urban areas unless technology can be made more efficient than it is today. A variety of advanced-technology cellular systems are currently under development that will facilitate more efficient use of the spectrum. However, the transition to advanced technologies most likely will be gradual. The proposal in this proceeding was designed to provide cellular operators the opportunity to make use of advanced cellular technologies as they become available. The Commission also recognized that in many smaller markets it may be possible to satisfy the demand for cellular service with less than the full amount of spectrum that has been allocated for this service. Consequently, the Commission suggested that it would be in the public interest to permit additional common carrier services to be offered on those frequencies not required immediately for cellular service.

5. Specifically, in the *Notice* the Commission proposed adding a new section to the cellular service rules, §22.930, "Special Provisions for Alternative Cellular Technologies and Auxiliary Services." Under the provisions of this proposal, cellular licensees would be authorized to use alternative technologies and to provide auxiliary common carrier services where such activities would not adversely affect conventional cellular service. Services provided under the proposed authority would not be subject to restrictions on channeling schemes, types of emissions and modulation techniques, and certain other technical requirements normally applied to cellular radio. The *Notice* also sought comment on whether the current antenna height-power limitations are necessary where it can be demonstrated that the field strength limits at the boundary of service areas will not be exceeded.

6. While the *Notice* proposed to liberalize the cellular rules, the Commission sought to avoid any detrimental impact on existing cellular service. In order to control interference the *Notice* proposed to: 1) permit advanced cellular and auxiliary common carrier (nonconventional) service on a non-interference basis; 2) continue to maintain the limit of 39 dBu at the boundary of the service area;[5] and 3) require frequency coordination between cellular systems consistent with existing requirements. The *Notice* also stated that the Commission was concerned about the maintenance of roamer service. Thus, comments were invited on whether the compatibility and other technical requirements should be maintained for some portion of the cellular frequencies. Furthermore, the *Notice* recognized the possibility that auxiliary services might be offered at the expense of increasing charges for cellular service or by reducing the availability of cellular channels. In this connection, the *Notice* tentatively concluded that competitive market forces could be expected to ensure against such practices; however, comments were invited on whether it would be in the public interest to issue guidelines or requirements concerning adequate cellular system service. The *Notice* specifically proposed to permit fixed and paging services on cellular frequencies. Also, the *Notice* invited comment on how to define dispatch services prohibited on cellular frequencies by statute. The Commission received 58 comments and 31 reply comments in response to the *Notice*. The commenters are listed in the Appendix.

DISCUSSION AND DECISIONS

General

7. Cellular service has undergone a rapid and highly successful development. This service has in its early stages been governed by detailed technical and compatibility standards. While these standards have served a useful purpose in providing a stable environment for the initial growth of this service, these same standards may now stand as an impediment to the development of a more spectrum-efficient service capable of accommodating the millions of additional cellular subscribers anticipated in the future. We note that the cellular industry is moving towards a voluntary standard for future cellular technology. We believe that this process can be encouraged by providing a mechanism to implement new technology without delay. We also find that cellular operators and the public could benefit if additional services could be provided in the cellular spectrum. We will, of course, continue to require that the cellular spectrum be used primarily to satisfy the demand for cellular service.

8. Therefore, based on the record developed in this proceeding, we conclude that a greater range of technical and service options in the cellular service is in the public interest. As an initial matter, we recognize that at least some cellular systems will be approaching their full capacity using existing technology within the next few years. Since it normally takes several years for new technology to be developed and for equipment to be produced, it is important that we take action now to encourage this process. By providing an opportunity for cellular operators to implement advanced cellular technology, we believe the incentive will be created for equipment developers to accelerate their efforts to meet prospective market demand.

9. On balance, we find that the benefits to the public and cellular operators of permitting greater technical and service options in the cellular service are substantial. We also find that there are adequate safeguards against detrimental impact on the cellular service with regard to: 1) liberalization of technical standards; 2) maintenance of cellular service; 3) compatibility of cellular systems; and 4) provision of auxiliary services. These matters are discussed below.

Technical Standards

10. *Transmission Standards*. In order to permit the use of advanced cellular technology the *Notice* proposed to relax standards pertaining to channeling plans (§22.902), emission types and modulation requirements (§22.906), and emission requirements (§22.907).[6] The *Notice* stated that these requirements appear to inhibit the introduction of advanced cellular technology. For example, modulation techniques other than the currently authorized form of FM signals are prohibited. We observed that if channels were to be reduced in bandwidth to 10 kHz, no benefit would result because the rules still would require channels to be spaced 30 kHz apart.

11. The cellular industry comments are divided on relaxing the channeling, emission and modulation standards. Parties in favor of relaxing these standards generally contend that such standards are unnecessary where frequency coordination is exercised between neighboring carriers. The American Telephone and Telegraph Company (AT&T) states that channeling, bandwidth and emission requirements stymie innovation with no corresponding benefits. According to AT&T, implementation of digital techniques using 10 kHz channels that can provide high quality communications can proceed only if the current technological standards are eliminated. GTE Mobilnet Incorporated states that a relaxation of these standards would increase a carrier's ability to fully use cellular spectrum.

12. Those opposed to relaxing the transmission standards contend specific standards must be maintained to offer neighboring carriers interference protection. Telocator Network of America expresses concern that a relaxation of modulation standards, emission requirements, or channeling plan may disrupt quality-cellular communications by increasing the potential for interference between systems. It notes that currently, interference between systems is avoided by placing a 39 dBu limit on the field strength at the boundary of cells.[7] Telocator submits that while the 39 dBu limit may afford adequate interference protection between neighboring analog-FM cellular systems, this limit may be inadequate for protecting one carrier from neighboring carriers that employ nonconventional technology. For example, it states that use of different modulation schemes or relaxed emission requirements could result in degraded communications and disrupt the widely accepted 18 dB C/I ratio which is used for designing FM-cellular configurations.[8] Telocator also contends that use of different channeling schemes may result in several narrow band signals, or one wide band signal (e.g. 40 kHz), interfering with a single 30 kHz receiver. To address these concerns Telocator submits that additional interference protection safeguards should be adopted. Specifically, it recommends the addition of the following measures to the proposed Special Provisions, §22.930:

> 1. Mobile-to-base transmissions should not be permitted to add more than 1 dB above the noise floor in any system outside the one offering the service;
>
> 2. The field intensity limit at a cellular system's service contour should be reduced by an amount corresponding to the increased C/I ratio that would be necessary to provide the same quality service in cases where modulation techniques other than FM are employed;
>
> 3. Total power per 30 kHz bandwidth should be limited to 100 watts; and 39 dBu field intensity level restrictions should be applied to the combined 30 kHz bandwidth rather than individual narrow band transmitters.

13. We recognize that use of nonstandard modulation techniques or relaxed emission requirements may affect the current interference protection level of 39 dBu at the boundary of cells. We also acknowledge that the 39 dBu standard serves to preserve the current quality of communications achieved by the industry-accepted 18 dB C/I ratio. We further are aware that the 18 dB C/I ratio could require adjustment, should carriers choose to employ nonconventional technology. However, we are not in a position to determine whether the C/I ratio would be degraded or improved by alternative technical systems, since it is unknown what form of advanced technology might be implemented. For example, a nonconventional signal may more readily interfere with a conventional FM-analog signal, than the currently used FM signals interfere with each other. Thus, a higher C/I ratio could be required for carriers that use conventional FM signals in markets that are adjacent to markets where nonconventional signals are employed. Any degradation of the current C/I ratio could adversely impact the quality of cellular communications or increase the distance in which frequencies could be reused. On the other hand, the use of nonconventional technology might improve the C/I ratio, thereby increasing the quality of communications or providing greater frequency reuse and thus, improving spectral efficiency.

14. The comments on the proposed relaxation of current channeling requirements do not convince us that the use of bandwidths narrower or wider than 30 kHz will increase the potential for interference. For example, if narrow bandwidths are used by a carrier, it is unlikely for that carrier to be in the situation where several of its narrowband transmitters are located equally close to a neighboring carrier, while simultaneously transmitting within the neighboring carrier's 30 kHz channel. With proper coordination, we believe that narrow bandwidths could be readily implemented to increase system capacities. Similarly, we are unpersuaded that bandwidths wider than 30 kHz would have an adverse effect on neighboring frequency plans if careful coordination is performed. Several articles have addressed the use of nonstandard channeling plans and have concluded that interference would not be increased, while system capacity could be increased with certain bandwidth schemes.[9] Therefore, we will permit the use of nonstandard bandwidths that can improve cellular system capacities provided their use is coordinated.

15. We also conclude that it would be impossible to prescribe a set of standards that would provide interference protection for every situation. Even those standards suggested by Telocator are incomplete in that no procedures for measurement are specified. Rather than implement a set of rigorous requirements that may over protect or under protect systems, we believe that instances of interference can best be handled on a case-by-case basis through the frequency coordination process. Cellular operators generally possess the technical expertise to perform appropriate analyses to limit the potential for interference between systems. Further, all auxiliary operations are secondary so that, if interference occurs, the interference must be corrected or the operation terminated. Therefore, we believe that there are adequate safeguards in place to avoid increased interference.

16. Overall, we believe that the cellular industry and cellular subscribers will greatly benefit from a relaxation of the technical standards. We are confident that through use of nonconventional equipment the industry will be able to improve spectrum efficiency and service to subscribers. Thus, in cities where demand is high, carriers will be free to implement new technology to increase system capacity. Alternatively, in less populated areas, carriers will be able to develop creative ideas to increase their use of available spectrum and provide better and

more diverse types of service. In light of these considerations, we believe the benefits of permitting carriers greater freedom far outweigh the risks of increased interference. Therefore, in §22.930, with respect to the use of nonconventional equipment, we will exclude requirements pertaining to the channelization scheme of §22.902 and the emission types and modulation requirements of §22.906, and apply the emission requirements of §22.907 only to the extent that emissions fall outside the cellular operator's frequency band.

17. *Antenna Height - Power Requirements.* The Rules currently impose limits on the antenna height and power of each base station in order to ensure that the field strength level of 39 dBu at the boundary of each cell of a system is not exceeded.[10] In the *Notice*, the Commission proposed to maintain these restrictions. However, comment was invited on whether these requirements continue to be necessary where it can be demonstrated that the field intensity limit at the boundary of the Cellular Geographic Service Area (CGSA) will not be exceeded.[11]

18. The cellular industry is divided as to whether the antenna height-power requirements should be relaxed. The cellular carriers and manufacturers in favor of relaxing the requirements believe that the requirements are unnecessary if the field intensity limit at the CGSA boundary can be maintained. They state that the requirements do not prevent interference, but do inhibit carriers from offering better service along the boundaries of their own cells. For example, McCaw Cellular Communications, Inc., Lin Cellular Communications Corporation and General Electric Mobile Communications Business indicate that antenna height-power requirements do not necessarily prevent interference between CGSAs since the requirements are based on a model (Carey's model) that does not account for terrain variations.[12] For the same reason these parties claim that Carey's model does not accurately define the boundaries of individual cells. Thus, in instances where a base station and a boundary of an individual cell are separated by a high propagation loss, service in a portion of the cell could be unavailable. Furthermore, McCaw indicates that a relaxation of these requirements could result in inexpensive single-cell systems that could be used to provide service to new regions sooner and with lower subscription rates than is currently possible. McCaw states that relaxing the requirements would permit carriers to design more efficient systems, enjoy considerable cost savings, and ultimately provide a higher quality of service to the public. McCaw specifically proposes allowing cellular base stations in metropolitan areas to use the same 500 watts effective radiated power as is currently permitted in rural areas and also proposes allowing carriers in adjoining markets to serve portions of the adjoining CGSA where agreements can be reached.[13]

19. Parties opposed to relaxing the antenna-height and power requirements argue that the current requirements should be maintained or examined in more detail. They state that areas exist where interference between systems occurs; and if the requirements were relaxed, interference problems may increase. For example, SNET Cellular, Inc. contends that the erratic nature of radio propagation over uneven terrain may result in field strengths that could be within the limits at the boundary of a CGSA while being excessive at points of higher elevation beyond that boundary.

20. Telocator, certain dispatch and paging interests, and local exchange carriers also oppose relaxation of the antenna-height power requirements. These parties maintain that a relaxation of the antenna height-power requirements could lead to the disruption of the cellular concept, thereby reducing spectrum efficiency. They state any unorthodox frequency usage could limit the ability of neighboring carriers to exercise cell splitting or sectoring.[14]

21. Commenting parties have persuaded us that the antenna height-power limitations are unduly restrictive. We believe that interference can best be controlled through coordination between carriers and by maintaining the field strength limit at the boundary of the CGSA. The antenna height-power restrictions are based upon a theoretical prediction of field strength. In practice, the actual field strength at the boundary of the service area may be less than predicted due to uneven terrain or other conditions causing unexpected signal losses. The result may be poor service in certain locations where the signals are less than predicted. Cell splitting may be used to improve the quality of service in locations of high signal loss; however, increased cost in constructing the system would result. We note that antenna height-power restrictions do not provide complete insurance againest interference. In some cases, signal losses may not be as great as predicted, such as where part of the signal path lies over water. Thus, the signal strength at the boundary of the service areas could exceed the limit even if the current antenna height-power restrictions are met.

22. We believe that numerous benefits would result from relaxing the antenna height-power restrictions. Relaxation would make it far easier for cellular operators in medium-sized to smaller markets to construct one-cell systems. Such systems would permit new service to subscribers more rapidly than is possible with multiple-cell systems. Additionally, the cost of constructing the system would be reduced, leading to lower costs for service. We disagree that the cellular concept would be jeopardized by permitting one-cell systems. As demand for cellular service grows in a given market, the single cell may be split to increase system capacity in the usual manner. Cell sectoring could be employed in the one-cell system to avoid any impact on the frequency reuse patterns of other nearby systems.[15] In view of the benefits that can be gained from relaxing the antenna height and power power requirements and the absence of serious potential for increased interference, we will allow cellular base stations in all areas to use 500 watts effective radiated power,[16] and we will retain an antenna height-power reduction table based upon using 500 watts ERP at a maximum antenna height of 500 feet.[17] However, we will continue to require that cellular carriers comply with the 39 dBu limit at the boundary of their CGSA as defined by the Carey report. That is, a carrier shall not be permitted to use a combination of antenna height and radiated power for a base station such that the carrier's service area is extended beyond the area it is authorized to serve without coordination with neighboring cellular carriers and approval by the Commission.

23. We note that Telocator asserts that the use of mobile units at unlimited heights or at fixed locations would result in an increased potential for interference. Telocator points out that the Carey analysis presumed that mobiles would have an antenna elevation of no more than 6 feet. Further, Telocator submits that the 39 dBu limit does not apply to mobiles; rather, interference is controlled by

limiting the power output of mobiles to 7 watts. Telocator also suggests that because mobiles are usually used while in motion, interference tends to be transient. Telocator states that this would not be the case if fixed operations were permitted on the mobile frequencies. We do not believe the points raised by Telocator are a serious concern. Even now, portable cellular equipment is available that can easily be used in buildings or other locations more than 6 feet above the ground, while use of the equipment in stationary positions does not present a significant interference problem. We believe that limiting the output power to 7 watts effective radiated power for all operations on mobile frequencies, as proposed, will continue to provide an adequate safeguard against interference.

24. *Coordination.* To permit technical flexibility, the Commission proposed in the *Notice* that all operations be frequency coordinated under Section 22.902(d) of the FCC Rules. Thus, cellular auxiliary services and advanced technologies would be coordinated so as to avoid interference with systems operating on the same frequency block within 75 miles.

25. Several parties argue that coordination under Section 22.902(d) would be insufficient to ensure against interference. The Cellular Telecommunications Industry Association (CTIA) states that the current frequency coordination requirement results in coordination only at the outer edges of a cellular system and does not reflect interference between systems. CTIA argues that interference coordination among carriers should be done as it is in other common carrier services, such as in the Domestic Public Fixed Radio Services under Part 21, or the Public Mobile Service under Part 22.[18]

26. GTE Mobilnet suggests that the Commission adopt a notice filing procedure whereby the carrier certifies that alternative operations have been frequency and interference coordinated with other service providers. It states that the procedure should require cellular licensees to provide notice to other users of the same or adjacent spectrum when nonstandard technology is used. GTE indicates the procedures for fixed common carrier services operating under Part 21 would suffice for this activity. On reply, CTIA implies that the detailed coordination procedure of Part 21 may be appropriate for each base station; however, CTIA states that such coordination would be unmanageable for mobile equipment. Southwestern Bell asserts that the comment period established in this docket is insufficient to fully analyze the issue of coordination. Southwestern Bell recommends that the Commission defer this issue to a separate proceeding or convene an industry forum to examine the issue in greater detail.

27. We recognize that coordination is vital in order to ensure against interference in the cellular service. The current coordination process for cellular service is built largely upon a foundation of cooperation between the licensees;[19] it permits cellular licensees to reach agreements to avoid interference. Cellular operators have generally cooperated well with each other in coordinating their systems and the existing process appears to be working well. We believe this spirit of cooperation will carry over to coordination of alternative services and technologies. Moreover, the construction and maintenance of a cellular system requires considerable technical expertise. Therefore, cellular operators can be expected to have the technical resources to analyze potential interference.

28. While we agree that further clarification of the proposed coordination requirement is necessary for nonconventional operations, we do not believe application of the coordination procedures in Sections 21.100 or 22.100 would be any more helpful. These rules differ from the basic thrust of the existing requirement for cellular systems only in the level of detail. The requirements in Parts 21 and 22 are more detailed in part because they apply to environments where there are no limits on the number of operators no: any restrictions on the locations of systems. In the case of cellular radio, there are a very limited number of systems that can be located within 75 miles of a given system and the boundaries of these systems are well-defined. We do not believe that a detailed requirement, listing all the technical information that must be coordinated, is necessary.

29. Our proposal for coordination was not intended to apply only to coordination of frequencies. However, the commenters' concerns suggest that we need to be clearer on this point. Therefore, in response to these concerns and suggestions we have modified the proposed rule Section 22.930(g) to clarify the coordination requirement. We are adding language to our original proposal for Section 22.930(g) to state specifically that cellular operators must perform an engineering analysis to ensure that interference will not occur from their implementation of auxiliary services or alternative cellular technologies.[20] The operator will be required to obtain the concurrence of other cellular operators using the same frequency block within 75 miles.

30. We are cognizant that coordination of alternative technical services may be more complicated than for existing cellular service. However, based on the past record of cooperation between carriers and given their technical resources and expertise, we believe the current coordination process is workable even for alternative technical services. The task of ensuring that nonconventional service can be provided on a non-interference basis to the existing service will fall on the carrier desiring to implement nonconventional service.

31. *Equipment Authorization.* When the Commission established service rules for cellular radio, it required equipment manufacturers to apply for equipment authorization under the type-acceptance program before marketing cellular radios.[21] Type-acceptance requires manufacturers to test equipment to ensure compliance with certain technical standards including emission types, operating frequency range and maximum output power.[22] The type-acceptance program allows the Commission's staff to review the interference potential of equipment before the equipment can be sold. Because of the potential for large numbers of mobiles and portables, the *Notice* proposed special precautions to reduce the risk of interference. Specifically, we proposed that all mobile and portable transmitters be type-accepted. For non-standard mobile units, whether operating on mobile or base frequencies, we proposed requiring that technical and other pertinent information be reported before the equipment is used.

32. The cellular industry generally supports the proposal that type-acceptance of all cellular and auxiliary service equipment should be required. We continue to believe that type-acceptance, whereby the emission characteristics of nonconventional equipment is reported to the Commission should be required. Equipment authorization under type-acceptance will help identify equipment

that may cause interference. Type-acceptance also will serve to ensure against illegal marketing of equipment intended for operation in the band allocated for cellular radio without the authority of the cellular operator. We therefore are imposing this equipment authorization requirement for nonconventional equipment operating under §22.930. Applications for type-acceptance should be filed pursuant to Parts 2 and 22 of the Rules and should include a report of measurements pertaining to types of emission, frequency range, maximum output power and modulation techniques.

Maintenance of Adequate Cellular Service

33. In the *Notice*, the Commission observed that in a competitive market, such as exists in the provision of mobile communications services, market forces compel service providers to offer the quality and quantity of products sought by consumers. The Commission indicated that it appeared that demand for cellular service is sufficiently strong that auxiliary services would not threaten the availability or quality of cellular service. Nevertheless, the Commission recognized that there is a possibility in some instances that cellular licensees might implement auxiliary services at the expense of cellular service, by increasing cost to cellular subscribers, or by allowing the quality of cellular service to decline (e.g. the blocking rate might increase).[23] Therefore, comments were invited on whether it would be in the public interest to set guidelines or requirements concerning cellular system quality.

34. Most of the commenting parties agree with the Commission's tentative finding that competition between the cellular operators in each market would continue to assure high-quality cellular service. However, a few disagree. Centel Cellular Company suggests the Commission require that there be not more than a 5 percent blocking rate for conventional cellular service to avoid congestion that would increase access waiting time. Centel states that some markets may induce one of the competing cellular carriers to provide other services at the expense of conventional service and that this situation should be avoided to ensure continued competition. The Electronic Industries Association Cellular and Common Carrier Radio Section (EIA) maintains that guidelines are needed concerning cellular service quality. Lin Cellular Communications Corporation asserts that the grade of service does not need to be regulated, but that transmission should be regulated. Lin states that relaxed technical requirements could degrade the quality of cellular transmissions.

35. We conclude there is no need to specify requirements or standards pertaining to the adequacy of cellular service. The majority of commenters agree that competition in the marketplace will assure the continued provision of high-quality cellular service. We find no evidence that a restriction on blocking rate is necessary. Should quality of service ever become a problem, we can consider the issue then. Moreover, there are a number of problems associated with regulation of blocking rates. The blocking rate is dynamic; the blocking rate varies by cell, time of day, season, automobile traffic conditions, etc. This would further complicate both the establishment of a standard and its enforcement. In some cases a cell can be completely blocked, yet no or few calls go unserved because other less-loaded cells carry the overflow. Therefore, we believe a requirement on blocking rate would be extremely difficult to fashion and enforce. Absent demonstrated need for blocking rate requirements, we do not believe the burden of establishing and enforcing such a requirement is warranted.

Compatibility

36. *Existing Cellular Systems*. OST Bulletin No. 53, *Cellular System Mobile Station - Land Station Compatibility Specification*, establishes technical requirements that form a compatibility standard for cellular mobile telecommunications systems. Technical parameters specified for compatible cellular radio operations include frequency usage, power output, modulation characteristics, emission limitations, and signaling protocols. Compatibility, as used in connection with these parameters, means that any cellular mobile telephone is able to place and receive calls in any cellular system; and conversely, all systems are able to place and receive calls for any mobile telephone.

37. The compatibility standard was adopted primarily to ensure that cellular subscribers could roam from one cellular service area to the next and still obtain service with minimal difficulty.[24] In addition, it was found that in the early stages of implementation of cellular service, a standard would enable small manufacturers to compete in a fair manner with major telephone equipment producers in the production of cellular mobile radios. There can be little doubt that the goals of compatibility and low-priced mobile radios have been accomplished. Currently, well over one million compatible cellular telephones are in use in this country, and the price has fallen from approximately2,500 in 1983 to less than500 today for some models. However, while the compatibility standard has been successful in these respects, it also has prevented newer, more-advanced, cellular technology from being implemented. It was for this reason that the *Notice* sought comment on whether to remove the compatibility standard or to maintain it on only a portion of the frequencies allocated for cellular service.

38. The *Notice* proposed that only a portion of the cellular allocation be maintained for service conforming to the present compatibility requirements, and sought comment on the option of deleting these requirements from the rules entirely. The *Notice* stated that the maintenance of roamer service appears to further the public interest, but inquired as to whether the existing system with its now more than one million phones may constitute a *de facto* compatibility standard that would allow roamer service to continue even in the absence of a Commission-mandated standard. The *Notice* also discussed alternative implementation options that would retain compatibility in the original 40 megahertz of cellular spectrum or that would require the maintenance of compatible service on some minimum number of channels.

39. All commenting parties agree that some compatibility should be maintained to allow for the continuance of roamer service. However, there is substantial disagreement as to how this can best be achieved. Some commenters contend that a marketplace approach would allow adequate compatibility to be maintained while at the same time optimizing the choice of future cellular technologies.[25] Others, however, claim that a marketplace approach is inappropriate, and state that the current compatibility standard should be retained until a future standard is adopted.

40. Some parties favor retaining compatibility in a large portion of the spectrum allocated for cellular service. For example, General Electric recommends retaining compati-

bility in the original 40 megahertz of cellular spectrum. Centel generally concurs with General Electric, but states that if cellular manufacturers became convinced that nonconventional services could operate without adverse effect on compatible service, nonconventional service could be authorized in a portion of the original 40 megahertz. Lin Cellular states that compatible service should be retained not only in the original 40 megahertz, but also in six to eight megahertz of the new ten megahertz as well.

41. We conclude that nonconventional technical systems can be allowed in a major portion of the cellular allocation without adverse impact on the goal of maintaining compatible cellular systems. We believe that each cellular operator will find it in its own self interest to ensure that compatible service continues to be provided to roamers and to its own local customers who continue to use conventional mobile equipment. We note that more than one million compatible cellular mobile units are now in use in about three hundred cellular systems. With such a large, recent investment in place, it is highly unlikely that cellular operators would simply scrap existing functional systems or disenfranchise customers. Moreover, the industry has indicated that any transition from the current compatible service to nonconventional service must accommodate its existing subscribers. Thus, we do not believe it is necessary to require that a cellular operator maintain a minimum number of channels to satisfy local and roamer conventional system requirements.

42. However, the amount of spectrum that will be required for roamer use undoubtedly will vary substantially from one system to the next. Thus, whatever minimum spectrum we might prescribe to satisfy demand for roamer service or conventional cellular service may be insufficient in some markets and unnecessarily restrictive in others. It would be impractical to set different requirements for each market since there are several hundred and the demand will be constantly changing. Therefore, we decline to specify the minimum amount of spectrum that must be devoted to roamer or conventional cellular service vis-a-vis nonconventional technical systems. We believe that the cellular licensees are in the best position to determine the proper mix for their markets. Those operators choosing to implement nonconventional technical systems will be responsible for ensuring that conventional service is available in sufficient amount to satisfy both local and roamer conventional requirements.

43. We are aware from industry discussions that the requirement to maintain compatible service has different ramifications for base stations and mobile equipment. A cellular operator choosing to implement advanced cellular technology will be required to use base stations that will provide conventional cellular service as well as advanced cellular service throughout its CGSA. We will not require advanced-technology cellular mobile equipment to operate in both conventional and advanced technology modes. We anticipate, however, that such "dual-mode" mobile equipment will be offered by cellular manufacturers for use in cellular systems where advanced technology service is available. Therefore, a cellular subscriber within an advanced-technology cellular system is likely to have a choice between purchasing a dual-mode mobile unit capable of operating both in the local system and in all other systems, purchasing an advanced technology mobile unit capable of operating only in the local system and other systems offering the same advanced technology service, or purchasing a conventional cellular telephone that is not capable of operating with the enhanced features of the advanced cellular system but is capable of roaming. With these future options available to consumers, we see no reason to require that advanced technology mobiles be dual-mode.

44. The only other limitation we will place on cellular operators with respect to nonconventional service is that we will prohibit such service on the 21 control channels in each cellular system. We note that several parties, including Ameritech, EIA, and SNET Cellular recommend that the control channels be maintained to ensure the continued provision of conventional service on a noninterference basis. We concur that allowing these channels to be used for nonconventional service would increase the risk of interference. Further, interference on a control channel would have a far greater detrimental impact on system operations and service to customers than would interference on voice channels. Accordingly, we will not permit nonconventional operations on the 21 cellular control channels.

45. Finally, we note McCaw proposes that we require cellular switches to be compatible.[25] McCaw proposes this to ensure that calls are not dropped when a subscriber with a call in progress moves between systems using switches of different types. However, McCaw presents no data on the number of calls so lost, and at present, we do not believe this is a major problem. Therefore, we decline to order a compatibility requirement between switches at this time.

46. *Advanced Cellular Systems.* In the preceding section, we noted that some parties to this proceeding recommend retaining the present compatibility standard in the entire cellular allocation until new standards are adopted. In particular, EIA and Ericsson support this approach. EIA states that there is no reason why new standards could not be compatible with the present one. Ericsson concurs with EIA, stating that the most successful European systems feature uniform compatibility. Ericsson proposes that uniform air-interface (interface protocol between the cellular base station and the subscriber terminal) and automatic roaming compatibility standards be adopted for the next generation of cellular systems. Ericsson states that the Commission does not have to set these standards, but should codify them once they are agreed to by industry. In this way, according to Ericsson, the public would obtain the benefits of competition in the equipment market without the increased costs that would result from the parallel development of systems based on different standards.

47. General Electric generally concurs with Ericsson. General Electric states that the maintenance of cellular interoperability should continue to be a central goal of cellular radio policy. General Electric indicates that there are at least 23 manufacturers of cellular equipment, and asserts that abandoning interoperability would set the stage for a single manufacturer to establish a proprietary technological base and exclude others.

48. Other parties strongly disagree that establishing new cellular compatibility standards would be beneficial. International Mobile Machines Corporation (IMM) states that the Commission should focus on interface, and not technology, standards in implementing new cellular technologies. IMM states that it is extremely unlikely that the cellular industry could agree on a new transmission standard and equally unlikely that the Commission could enforce it. In any case, according to IMM, the question of

a single standard for digital cellular systems is probably a moot point, since the rate of generational change in digital techniques is so great; e.g., coding and modulation design change in about three to five years. IMM sets forth a series of proposals designed to facilitate the upgradability of cellular systems to accept new radio technologies on an ongoing basis.

49. Northern Telecom agrees with IMM that new cellular technology standards should not be mandated. Northern states that there is no doubt that digital radio will eventually replace analog radio in cellular services, and argues that market forces should determine the precise digital radio standard *(e.g.,* channel coding) and basic technologies (e.g., Frequency Division Multiple Access or Time Division Multiple Access) to be used.

50. PacTel Cellular and Bell Atlantic Mobile Systems concur with IMM and Northern about the importance of planning for future digital cellular technology, but disagree that digital standards should be left to the marketplace. Bell Atlantic states that it is of primary importance to develop standards to ensure compatibility for high capacity digital cellular technology and PacTel asserts that the Commission should commence a rule making to establish digital compatibility standards.

51. We note that the Telecommunications Industry Association Standards Committee has begun work on a standard for the next generation of cellular systems. Several different candidate advanced cellular technologies are under consideration.[27] While much work needs to be done, the Committee has taken some very positive initial steps to address issues of compatibility for future cellular systems. We believe it would be premature for the Commission to intervene in the standards setting process. Industry is in a better position to evaluate the technical advantages and disadvantages of the various advanced cellular technologies and develop approaches to compatibility. Moreover, a Commission rule making is apt to delay this process. We note that development of the initial cellular standard through rule making took several years.

52. We believe that the transition to new cellular technologies will be encouraged and made easier by granting cellular operators the liberty to implement them without the delay involved in a Commission rule making. The public interest is served by enabling advanced cellular technology to be offered as soon as possible. Unless this happens, it is quite possible that some cellular systems in major markets will reach saturation and quality of service will suffer. We find it unlikely that different advanced technology cellular systems that are incompatible with each other will be implemented in different markets. As suggested by some commenters, it is feasible that minimal air-interface standards could be developed that would accommodate a variety of technologies while still maintaining compatibility. We anticipate that the industry will find ways to achieve compatibility between a variety of systems.[28] In light of these considerations, we decline to take Commission action moving towards a compatibility standard for future cellular systems at this time. However, we plan to monitor the progress of the industry Committee.

53. In this same regard, we do not find it appropriate at this time to address the issue of digital cellular systems in a separate proceeding. As discussed by IMM, the rate of change in digital techniques appears to be so great as to limit severely the value of such a proceeding. Furthermore, it is not clear that the next generation of cellular technology will be exclusively digital. Narrowband analog technologies are also being explored at present.[29] However, should an industry consensus develop on digital technology, we can address this issue at that time.

Auxiliary Common Carrier Services

54. *Impact on Cellular Efficiency.* Several parties express concern that allowing auxiliary use of cellular frequencies would impair cellular efficiency. They argue that certain auxiliary services would use a single frequency throughout the cellular service area without the reuse characteristic of cellular systems. Several commenters contend that paging is an example of an inefficient use of the cellular spectrum. They also state that since paging is a one-way service, half of the two-way cellular channel would be wasted.

55. Telocator, in particular, points out that communicating with a single frequency receiver would require the use of one frequency in each cell or alternatively, the use of one high powered base station that communicates throughout a CGSA. Telocator contends that this system-wide allocation of a single frequency would demand substantial deviation from – and effectively destroy – conventional frequency reuse patterns. Furthermore, Telocator asserts, the present 100 watt power limitation on cellular base stations would be inadequate for the provision of reliable paging service. Mobile Communications Corporation of America (MCCA) concurs with Telocator, stating that its affiliates operate both paging and cellular systems in Houston, and that approximately 60 cells would be required from its cellular affiliate to provide wide-area paging coverage comparable to that achieved by its paging affiliate.

56. AT&T expresses a similar concern to that of Telocator and MCCA, stating that while it favors liberalizing the use of cellular frequencies, such liberalization should not be in derogation of the cellular concept. AT&T contends that a service provider should not, for example, be allowed to bypass the cellular switch and install a single, high-powered transmitter on a tall building to serve an entire congested urban service area.

57. Parties representing cellular companies, however, disagree that permitting paging or other uses of cellular frequencies would be inefficient. CTIA states that it has performed an analysis which showed that paging could be offered on cellular frequencies with minimal impact on cellular service. According to CTIA, while it is impossible to make a universal quantification of the impact and conversion of a single cellular voice channel to paging-only, a worst-case analysis showed that the number of possible simultaneous cellular calls would be reduced by only 29 (from 6,480 to 6,451) in a system where one voice channel was taken and dedicated system-wide to wide-area paging. Furthermore, CTIA states that this one channel could serve more than 30,000 digital paging units.

58. Bellsouth Corporation concurs with CTIA, stating that Telocator's argument that paging use of a single channel would make inefficient use of a paired channel is incorrect because synthesized paging receivers can scan a group of frequencies. Bellsouth further states that future digital cellular technologies will allow the interweaving of digital page messages into the digital voice stream, and not increase the cellular blocking rate. Bellsouth concludes that the likely result of the provision of paging on cellular frequencies would be the use of new and efficient technologies, resulting in more efficient spectrum utilization.

59. We agree that efficiency in terms of frequency reuse would be reduced if a single frequency is used for paging or some other service throughout a cellular service area. However, this is not the only, nor necessarily the most important, measure of efficiency. It is in fact conceivable that paging could improve the overall communications efficiency of cellular service. It generally takes less air-time to transmit a message via a page than by voice over a telephone. Thus, to the extent that paging is able to reduce the amount of air-time for certain short messages, the overall efficiency of communications for the system may be improved. Moreover, if a channel is not needed to satisfy the demand for cellular service in an area, using that channel for another purpose has no impact whatsoever on the efficiency of the cellular system. Even in theory, as pointed out by CTIA, the reduction in efficiency is insignificant. We find no reason to require auxiliary communications to be routed through the cellular switch. While it is true that this may ensure frequency reuse, it will not necessarily result in the most efficient handling of communications.

60. Cellular operators have strong economic incentives to use their spectrum efficiently. Cellular revenues are determined in part by the number of subscribers. Therefore, it is in the self-interest of the operator to use available spectrum in a manner that is capable of satisfying the demand for service. This necessitates efficient use of the spectrum. In addition, the extent to which auxiliary services may be offered to increase revenues will be determined by how efficiently the cellular operator can satisfy cellular demand. Moreover, we find that the individual cellular operators are in the best position to determine how auxiliary services might be offered in the most efficient manner. In light of these considerations, we reject the arguments that the Commission should restrict auxiliary services in order to avoid a reduction in cellular efficiency.

61. *Fixed Service.* In the *Notice*, we specifically proposed allowing cellular operators to provide fixed point-to-point services under the auxiliary services option. In addition, in our *Report and Order* establishing Basic Exchange Telecommunications Radio Service (BETRS),[30] we indicated that we would consider a BETRS type of fixed use of cellular frequencies on a more than incidental basis in the instant proceeding. Currently, cellular service to fixed locations is permitted only on an incidental basis.

62. The commenters generally favor the provision of fixed services on an auxiliary basis. However, local exchange carriers (LECs) express concern about the possibility of fixed service by cellular carriers in Rural Service Areas jeopardizing the financial viability of LECs. Also, LECs state that if fixed cellular service is permitted, the Commission should not preempt state regulation. Cellular carriers support the provision of fixed cellular services on an unrestricted basis.

63. The National Telephone Cooperative Association (NTCA) addresses the regulatory issue, stating that fixed cellular service is desirable, but that the legitimate role of state government in regulating the provision of fixed service must be recognized. NTCA argues that fixed service could be either an integral part of a cellular mobile system or a local exchange system at the local carrier's option and this would provide an additional option for operation of basic exchange services. NTCA also maintains that states must have the opportunity to take appropriate action in situations where competition from an unregulated supplier could be destructive to the LEC's universal service capability.

64. The Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO) addresses both economic and regulatory issues, stating that the provision of fixed telephone service by cellular licensees that are not LECs is outside the scope of this proceeding. It argues that if non-LECs are allowed to provide basic telephone service, the financial viability of many small independent telephone companies could be endangered. OPASTCO states that until a separate proceeding has resolved the issue of cellular licensees providing basic exchange service, only state-certified LECs should be permitted to provide fixed point-to-point services under the auxiliary services option. OPASTCO further states that if the Commission is determined to resolve this issue in this proceeding, it should require that cellular operators satisfy the same state certification requirements that it has imposed upon other providers of Basic Exchange Telecommunications Radio Service (BETRS).

65. Bellsouth Corporation disagrees with NTCA and OPASTCO, stating that concern expressed regarding state jurisdiction over the provision of fixed cellular services is misplaced. It submits that under the Communications Act, the Commission's authorization of radio spectrum use complements, rather than displaces, the regulatory powers granted to the states. Bellsouth further states that fixed cellular service, like other auxiliary services, should be authorized on a secondary basis, and that this would render the current rule authorizing fixed cellular on an incidental basis unnecessary.

66. Upon consideration of the comments, we conclude that use of cellular frequencies for BETRS is appropriate, but that other fixed cellular services should remain on an incidental basis as presently authorized by our Rules. We believe that allowing other fixed cellular use as proposed under the auxiliary services option could create technical and regulatory problems that might adversely impact mobile use of cellular frequencies. Nevertheless, use of cellular frequencies for BETRS is in the public interest since it is intended to be an extension of basic exchange service in areas where there is inadequate or no basic exchange telephone service offered. Moreover, we agree with Bellsouth that our authorization of cellular frequencies for BETRS in no way compromises the ability of the states to regulate provision of basic exchange service. Accordingly, no competition between LECs and cellular carriers for provision of basic exchange service will result unless such competition is the policy of the individual state. We note that in states where such competition is prohibited, a LEC could lease or resell frequencies from a cellular carrier in order to provide BETRS to subscribers in its area.

67. *Paging Service.* There is considerable controversy about the provision of paging service by cellular carriers. In addition to the efficiency issue already addressed, paging interests contend that allowing cellular carriers to offer paging service would be anti-competitive and would create problems because of cellular carriers' ability to cross-subsidize and circumvent state regulation. MCCA, for example, states that paging use by cellular carriers would present questions regarding state certification, and that the Commission's preemption of state entry regulation of cellular systems cannot serve as a basis for determining that paging service on cellular frequencies is also exempt from state regulation.

68. Cellular operators, on the other hand, strongly support the authorization of paging on cellular frequencies, stating that the marketplace would determine if it is desirable for cellular carriers to offer paging. Several state that opposition to paging on cellular frequencies is based upon paging firms' desire to avoid competition rather than a concern about cross-subsidization, which, they maintain, is unfounded. Bellsouth, for example, states that allowing cellular carriers to offer paging service would promote competition in the paging industry. Bellsouth notes that some cellular carriers are already providing paging on non-cellular frequencies, and that there is no indication of cross-subsidization.

69. We have considered the arguments made by both opponents and proponents of paging on cellular frequencies. We conclude that there is no fundamental difference between paging and other auxiliary services that might be offered by cellular operators. We believe that paging, like other services, will not be implemented on cellular frequencies unless it is beneficial from both the operator's and subscribers' perspectives. Regarding legal issues arising from the provision of paging on cellular frequencies, we are not herein preempting state regulation of paging operations.[31] Cellular operators that wish to use excess capacity to offer paging as an auxiliary common carrier service must meet all pertinent state regulations, including certification, if so required. State regulation of cellular paging operations should protect in the first instance against any possible cross-subsidization that might occur between cellular and paging operations.

70. *Dispatch Service.* In the *Notice*, we proposed to clarify the statutory prohibition of dispatch service on cellular frequencies, by redefining dispatch service in our rules to mean communications involving a dispatcher who simultaneously communicates with multiple mobile units. Currently, the definition reads: "Two-way voice communications, normally of not more than one minute's duration, between a common carrier base and land mobile stations, or between a common carrier land mobile station and a landline telephone station not connected to a public message telephone system."[32] The provision of any dispatch service by cellular operators is opposed by Specialized Mobile Radio (SMR) operators who currently provide this service. Several SMRs and SMR organizations state that our proposed redefinition of dispatch to include only fleet-calling would violate the intent of the Communications Amendments Act of 1982.[33] SMR interests also allege that permitting cellular operators to provide dispatch service would be anti-competitive and impair basic cellular service by transferring capacity intended for conventional cellular use to dispatch use instead.

71. Motorola, Inc. maintains that Congress intended to prohibit common carrier provision of all dispatch services in its enactment of the Communications Amendments Act of 1982. At the time of the 1982 legislation, Motorola observes that FCC rules permitted common carrier provision of general and dispatch service, but prohibited fleet-call dispatching, except on a developmental basis. Since fleet-call dispatch was already prohibited at that time, according to Motorola, there would have been no need for Congress to place additional language in the Act if it had merely wanted to prohibit fleet calling. Motorola asserts that the Commission is precluded from modifying the dispatch communications definition now contained in the Rules in any way which would permit a cellular operator to provide any type of dispatch service.

72. The American SMR Network Association, Inc. (ASNA) concurs with Motorola, stating that the proposed redefinition of dispatch service would be unlawful. ASNA states that the critical legal issue is not whether the content of the transmission is dispatch or non-dispatch in nature, but how the system is designed to transmit the message. According to ASNA, a cellular call is not generally made by a party who would typically be considered a dispatcher, and it is not transmitted directly to the unit being contacted. ASNA contends that Congress in 1982 did not seek to bar dispatch-like messages transmitted in a conventional manner using switched cellular facilities, but only sought to prohibit those transmissions which are communicated by a dispatcher directly over-the-air to a single or multiple receiving units. ASNA further argues that the legislative history of the 1982 Act makes it clear that Congress intended to broaden the dispatch prohibition in 1982. ASNA also addresses the competitive issue, stating that allowing cellular operators to provide dispatch service would be inconsistent with the concept of fair competition because of cellular operators' greater spectrum resources and differing regulatory requirements.

73. Cellular operating companies as well as a few other entities strongly support the allowance of dispatch service on cellular frequencies. They state that the Commission's proposed redefinition of dispatch service is legally sound, pro-competitive, and would enable more efficient use of cellular frequencies.

74. Minilec Service, Inc., a company involved in the development of new communications technologies, addresses both legal and efficiency issues, stating that the proposed redefinition does not go far enough. It argues that the legislative history of the 1982 Act contemplates common carriers competing with private systems for dispatch business. Further, according to Minilec, cellular carriers should not be constrained by a narrow definition of dispatch service from offering any type of mobile or fixed communications service that does not unreasonably impair the spectral efficiency of cellular technology.

75. Bellsouth generally concurs with Minilec, stating that without a redefinition of dispatch service, Section 331(c) of the Communications Act would have a chilling effect on the development of non-dispatch services that may be similar to the dispatch service addressed in this statute.[34] Bellsouth further states that Congress' purpose in adopting Section 331(c) was to provide a definition of private land mobile services, and that dispatch services were not defined in the statute or in the legislative history. However, according to Bellsouth, the legislative intent was not to impair cellular carriers' ability to develop and provide new services.

76. Upon consideration of the comments and further reflection on the language in the Conference Report to The Communications Amendments Act of 1982, we conclude that ASNA's interpretation of Congressional intent is correct.[35] The Conference Report indicates that dispatch communications were to be provided on an unregulated basis in the private land mobile services. Further, the Conference Report states that the objective of the Conferees is to assure that frequencies allocated for use by radio common carriers are not devoted to dispatch service to any significant extent. Nevertheless, it is evident that parties that normally engage in dispatch communications, such as police and taxi companies, may find cellular systems useful for certain communications and the Conferees did not intend to bar such parties from using

cellular systems. Many cellular calls are similar to dispatch operations; e.g., a salesman or family member may be directed to a particular location in a brief conversation. These calls, however, are indistinguishable from other cellular calls because they are made in a conventional cellular mode rather than on channels reserved solely for dispatch use.

77. We believe that Congress did intend to prohibit transmissions on cellular frequencies which are communicated from a dispatcher wherein certain cellular channels would be used on a wide-area basis for direct communications. Use of a conventional cellular telephone for dispatch-type communications is not the provision of dispatch service and therefore would not be prohibited. In this latter situation, communications are routed through the cellular switch with no intervention of a dispatcher. Accordingly, in light of the comments, and in view of our desire to clarify the current definition in our rules of "dispatch communication", we are redefining this term as follows: "Two-way voice communication, normally of not more than one minute's duration, that is transmitted between dispatcher and one or more land mobile stations, directly through a base station, without passing through the mobile telephone switching facilities". This definition will clarify that dispatch-type communications can be provided on cellular frequencies so long as the communication is not directly between a dispatcher and end users; i.e., dispatch service.

Secondary Status

78. The *Notice* proposed to permit greater technical and service freedom on the condition that interference to other cellular systems is not created. Several commenters agree with this stipulation and state that any nonconventional operations be made secondary to conventional cellular service. Some parties argue that auxiliary services should be secondary, but are silent with regard to the status of advanced technology cellular systems.

79. We recognize the possibility that permitting nonconventional operations on a co-primary basis with conventional cellular service could result in interference to conventional service. Furthermore, we believe the record in this proceeding supports the allowance of nonconventional operations on a secondary basis only. Therefore, in order to avoid disruption of existing service, we are authorizing all nonconventional operations on a secondary basis to conventional service. Secondary status means that if a nonconventional operation is initiated and interference occurs to conventional service, either the interference must be corrected or the operation must be terminated.

80. We do not anticipate that a secondary status will hinder the introduction of advanced cellular technologies or auxiliary services. This is in part because the cellular operator would have control over both the secondary nonconventional operations and conventional cellular service within its own area. We also do not believe that potential interference with other adjacent cellular systems will be an impediment. The coordination requirement should ensure that the secondary system is designed to avoid interference. In addition, this process provides an opportunity for the party implementing nonconventional operations to evaluate potential interference to the secondary system. We anticipate that through cooperation between cellular operators, assurances can be provided that interference to nonconventional systems will be avoided.[36] Therefore, with this process in place, we believe that the proper safeguards are available to encourage investment in nonconventional operations.

REGULATORY FLEXIBILITY ACT – FINAL ANALYSIS

81. Pursuant to 5 U.S.C. Section 603, an Initial Regulatory Flexibility Analysis was incorporated in the *Notice of Proposed Rule Making* in General Docket No. 87-390. Written comments on the proposals in the *Notice*, including the Regulatory Flexibility Analysis, were requested.

82. *Need for and Objective of Rules*. Our objective has been to facilitate the rapid introduction of advanced cellular technologies and to permit the introduction of additional service offerings in the Domestic Public Cellular Radio Telecommunications Service.

83. *Issues Raised by the Public in Response to the Initial Analysis*. Several parties suggested modifications or clarifications to the proposals set forth in the *Notice*. As a result of these comments, we have adjusted our proposals as appropriate. For example, a number of commenting parties suggested that we allow advanced technologies and auxiliary services in the cellular allocation only on a secondary basis, and we have incorporated this suggestion in our *Report and Order*. We have also modified our proposed redefinition of dispatch communication, and liberalized cellular antenna height-power requirements in response to the comments.

84. *Any Significant Alternative Minimizing Impact on Small Entities and Consistent with Stated Objectives*. We have reduced burdens wherever possible. The regulatory burdens we have retained are necessary in order to carry out our duties under the Communications Act of 1934. We will continue to examine alternatives in the future with the objectives of eliminating unnecessary regulations and minimizing any significant economic impact on small entities. A copy of this *Report and Order* shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

85. Cellular licensees that choose to initiate new cellular technologies or offer additional services will be required to report such undertakings to the Commission. Information must be included to explain what steps have been taken to ensure against interference to other nearby cellular systems. The rule amendments contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new information collection requirement on the public. This requirement has been approved by the Office of Management and Budget (OMB control number 3060-0399).

ORDERING CLAUSES

86. Authority for this Rule Making is contained in Sections 4(i), 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 303(c), 303(f), 303(g), and 303(r).

87. Accordingly, IT IS ORDERED, that Parts 2 and 22 of the Commission's Rules and Regulations ARE AMENDED as specified below, effective January 26, 1989.

RULE CHANGES

88. Parts 2 and 22 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

A. PART 2 - FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

1. The authority citation in Part 2 continues to read:

AUTHORITY: Sec. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted.

2. Section 2.106, the Table of Frequency Allocations, is amended by listing footnote NG151 in column 5 for the 824-849 MHz and 869-894 MHz bands and by adding the text of footnote NG151 to the list of footnotes at the end of the table as follows:

§2.106 *Table of Frequency Allocations*

* * * * *

Non-Government (NG) Footnotes

* * * * *

NG151 In the frequency bands 824-849 MHz and 869-894 MHz, cellular land mobile licensees are permitted to offer auxiliary services on a secondary basis subject to the provisions of Part 22.

* * * * *

B. *Part 22 - PUBLIC MOBILE SERVICE*

1. The authority citation in Part 22 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1083, as amended (47 U.S.C. 154, 303), sec. 553 of the Administrative Procedure Act (5 U.S.C. 553), unless otherwise noted.

2. In Section 22.2, the definitions of basic exchange telecommunications radio service and dispatch communication are revised to read as follows:

§22.2 *Definitions*

* * * * *

Basic Exchange Telecommunications Radio Service. In the Rural Radio Service, this service provides public message communication service between a Central Office and fixed subscribers located in rural areas. In the Domestic Public Cellular Radio Telecommunications Service, this service provides public message communication service to fixed subscribers in Rural Service areas and in rural parts of Metropolitan Statistical Areas.

* * * * *

Dispatch Communication. Two-way voice communication, normally of not more than one minute's duration, that is transmitted between a dispatcher and one or more land mobile stations, directly through a base station, without passing through the mobile telephone switching facilities.

* * * * *

3. In Section 22.900, the first sentence is revised to read as follows:

§22.900 *Scope*

This subpart sets out the regulations governing the licensing and operations of cellular systems authorized in the bands 824-849 MHz and 869-894 MHz.

* * * * *

4. Section 22.904 is revised to read as follows:

§22.904 *Power limitations.*

Stations in this service shall not be permitted to exceed the effective radiated power indicated below.

	Watts (ERP)
Base stations	500
Mobile stations	7
Auxiliary test stations	7

5. Section 22.905 is revised to read as follows:

§22.905 *Antenna height - power for base stations*

In view of the fact that the predominant characteristic of cellular systems is frequency reuse within a given service area, the effective radiated power (ERP) of base stations with transmitting antennas in excess of 500 feet above average terrain (AAT) must be reduced as shown in the table below, unless coordination is performed and agreements are reached with all neighboring co-channel carriers that are within 75 miles.

Antenna Height (AAT in feet)	Watts (ERP)
500	500
550	397

600	323
700	223
800	166
900	126
1,000	98
1,250	57
1,500	37
2,000	20
2,500	13
3,000	10
3,500	9
4,000	8
5,000	7

For AATs between the above listed values, linear interpolation should be used.

6. Section 22.911 is amended by revising paragraph (d) and adding new paragraph (e) to read as follows:

§22.911 *Permissible communications*

* * * * *

(d) General communications are permitted on cellular frequencies. Dispatch communications are prohibited on cellular frequencies.

(e) Cellular operators and resellers so authorized by their State regulatory entities may offer fixed basic exchange telephone service in RSAs and rural parts of MSAs. Other fixed cellular services may be offered on an incidental basis pursuant to Section 22.308 of these Rules.

7. Part 22 is amended by adding Section 22.930 to read as follows:

§22.930 *Special Provisions for Alternative Cellular Technologies and Auxiliary Services*

Provided that interference to other cellular systems is not created, and service to roamers whose mobile equipment conforms to OST 53 is offered, cellular licensees may employ alternative cellular technologies and auxiliary common carrier services in the frequency bands 824-849 MHz and 869-894 MHz, except on the cellular control channels. These special provisions will be referred to as the cellular service option. The cellular service option may be exercised subject to the following requirements:

(a) Cellular licensees may offer advanced cellular technology or auxiliary communication services on a secondary basis. The cellular licensee will be responsible for all operations in its authorized frequency block and service area.

(b) Cellular licensees are required to inform the Commission of the new technology or new services to be provided under the cellular service option by filing Form 489 pursuant to the requirements specified in Section 22.117 at least 30 days prior to the implementation of the services. The information required to be filed with the Commission includes a description and classification of the services intended to be offered, and a listing of any new or modified transmitting facilities.

(c) Operations under the cellular service option are subject to the technical requirements in Sections 22.903, 22.904, and 22.905. The emission requirements of Section 22.907 will be applied, but only to the extent of those emissions that fall outside the specific cellular frequency bands licensed to the operator, i.e., band A or band B. Mobile transmitters are subject to type acceptance in accordance with Part 2 of the Rules.

(d) A cellular licensee's CGSA will be based on cellular facilities only. The 39 dBu contours of auxiliary service facilities will not be considered when demonstrating the 75 percent coverage requirement specified in Section 22.903. In addition, the 39 dBu contours of auxiliary service facilities must be contained within the CGSA. Furthermore, the construction of an auxiliary service facility does not satisfy the construction requirements of Section 22.43(c).

(e) Operations under the cellular service option are not subject to the channeling requirements of Section 22.902, the types of emissions and modulation requirements of Section 22.906, or the emission requirements of Section 22.907. The requirements of Section 22.911 pertaining to permissible communications shall apply under the cellular service option, except for the channel pairing requirement.

(f) For mobile facilities (other than cellular radio), the information required by paragraph (b) must include the number of units to be placed in service, manufacturer's name, FCC identification number, and specific frequencies of operation. Licensees shall submit emission, bandwidth and frequency tolerance data to the Commission demonstrating compliance with the rules.

(g) The only fixed service authorized under the cellular service option is Basic Exchange Telecommunications Radio. For this service, the information required by paragraph (b) must include sufficient technical data and calculations to verify compliance with the aggregate field strength limit. Calculations are required at eight equally spaced intervals around the service contour. Other data required for fixed transmitters is the manufacturer's name, model number, rated output power, operating frequency, frequency tolerance, modulation type, emission profile, and antenna location, elevation, orientation, and pattern.

(h) Operations under the cellular service option are subject to frequency coordination in accordance with Section 22.902(d) and the following requirements. The cellular system operator must perform an engineering analysis to ensure that interference will not occur from implementation of auxiliary services or alternative cellular technologies. The operator must obtain the concurrence of other cellular systems on the same frequency block within 75 miles.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Commenting Parties

Able Communications
Ad-Hoc Group of Independent Telephone Companies
Alltel Mobile Communications, Inc.
American Mobilephone Paging, Inc.
American Paging, Inc.
American SMR Network Association, Inc.
American Telegraph and Telephone Company
Ameritech Mobile Communications, Inc.
Arthur K. Peters, Consulting Engineers
Autophone of Kerrville, Inc.
Autotel Communications Network;
Sigma Telecommunications; and
The American Mobile Systems, Inc.
Bell Atlantic Mobile Systems, Inc.
Bellsouth Corporation and Bellsouth Mobility Inc.
Bydatel Corporation
Cathey, Hutton, & Associates
Cellular, Inc.
Cellular Telecommunications Industry Association
Centel Cellular Company
Century Cellunet, Inc.
The Committee for the Advancement of
Cellular Telephone Service
Communications Properties Associates
Contel Corporation
Contemporary Group
Cook Telcom, Inc.
Electronic Industries Association Cellular
and Common Carrier Radio Section
Ericsson North America, Inc.
General Electric Mobile Communications Business
GTE Mobilnet Incorporated
Hello Pager Company
Hughes Network Systems, Inc.
International Mobile Machines Corporation
Lin Cellular Communications Corporation
Loomis Communication Company
McCaw Cellular Communications, Inc.
Minilec Service, Inc.
Mobile Communications Corporation of America
Motorola, Inc.
National Association of Business and
Educational Radio, Inc.
National Association of Regulatory
Utility Commissioners
National Telephone Cooperative Association
NEC America, Inc.
Northern Telecom Inc.
Novatel Communications, Ltd.
NYNEX Mobile Communications Company
Organization for the Protection and Advancement of Small Telephone Companies
PacTel Cellular
Puerto Rico Telephone Company
Southwestern Bell Corporation
SNET Cellular, Inc.
Stenocall Lubbock Radio Paging
Summit Mobile Radio Company d/b/a
Summit Communications Company
Tele-Page
Telocator Network of America
Telular, Inc.
Texas Statewide Telephone Cooperative, Inc.
The United States Telephone Association
Vanguard Cellular Systems
Waco Communications, Inc.

Reply Comments

A Air-Alert
American SMR Network Association, Inc.
American Telegraph and Telephone Company
Autotel Communications Network;
Sigma Telecommunications; and
The American Mobile Systems, Inc.
Be In Touch, Inc.
Beeper Rental Service
Bellsouth Corporation and Bellsouth Mobility Inc.
Cellular Telecommunications Industry Association
Contel Cellular, Inc.
Communications Properties Associates
Electronic Industries Association Cellular
and Common Carrier Radio Section
Graphic Scanning Corporation
International Mobile Machines Corporation
King Communications
McCaw Cellular Communications, Inc.
Mobile Telephone Service
Modern Communications Corp.
Motorola, Inc.
National Telephone Cooperative Association
Novatel Communications, Ltd.
NYNEX Mobile Communications Company

Organization for the Protection and
Advancement of Small Telephone Companies
Pacific Bell
PacTel Cellular
Personal Communications, Inc.
Phonepower of Delaware
Puerto Rico Telephone Company
Southwestern Bell Corporation
Telocator Network of America
TPI Transmission Services, Inc.
The United States Telephone Association

FOOTNOTES

[1] *See First Report and Order and Second Notice of Inquiry*, Docket 18262, 19 RR 2d 1663 (1970).

[2] *See Cellular System Mobile Station - Land Station Compatibility Specification*, OST Bulletin No. 53, July 1983. OST--the Commission's Office of Science and Technology--has since been renamed the Office of Engineering and Technology.

[3] *See Notice of Inquiry and Notice of Proposed Rule Making*, CC Docket 79-318, 78 FCC 2d 984, 1002 (1980).

[4] *See Notice of Proposed Rule Making*, GEN Docket 87-390, 2 FCC Rcd 6244 (1987).

[5] The 39 dBu figure set forth in Section 22.903 of the Rules refers to the electric field strength by which a carrier's service area is defined.

[6] 47 CFR Sections 22.902, 22.906 and 22.907.

[7] *See Technical Factors Affecting the Assignment of Facilities in the Domestic Public Land Mobile Radio Service*, by Roger B. Carey. FCC Report No. R-6406, July 1983. With the current FM-analog technology the 39 dBu field intensity is the minimal level needed for mobile radios to work reliably. If levels higher than 39 dBu are present at the cell boundary, then the potential for interference to neighboring cells increases.

[8] C/I - Carrier/Interference ratio. This ratio provides cellular system operators with an indication of how far apart cells must be before channels can be reused. Through subjective testing, the cellular industry has found that subscribers object to an interfering signal when the subscriber's carrier signal is not at least 18 dB stronger than an interfering signal. This ratio is based on the use of current analog-FM technology. Should carriers wish to design their system using greater protection; *i.e.*, a greater C/I ratio, then a greater distance between cochannel cells would be required. Telocator argues that nonconventional technology may result in an increase of the currently accepted 18 dB C/I ratio. Thus, carriers would not know what C/I ratio is acceptable and therefore would have difficulty in designing systems that perform with the equivalent quality of current systems.

[9] *See* W. C. Y. Lee, "New Cellular Schemes for Spectral Efficiency," *IEEE Transactions on Vehicular Technology*, Vol. VT-36, No. 4, November 1987. *See* also W. C. Y. Lee, "Narrowbanding in Cellular Mobile Systems," *Telephony*, pp. 44-46, Dec. 1, 1986. *See* also, J. F. Whitehead, "Cellular Spectrum Efficiency via Reuse Planning," *35th IEEE Vehicular Technology Conf. Rec.*, Boulder, Co., 1985, pp. 16-20.

[10] *See* §22.904, "Power limitations", and §22.905, "Antenna height-power for base stations". For antennas up to 500 feet in height, the maximum effective radiated power (ERP) is 100 watts for Metropolitan Statistical Areas (MSAs), New England County Metropolitan Areas (NECMAs), and Rural Service Areas (RSAs) less than 24 miles from an MSA or NECMA, and 500 watts for RSA facilities located 24 miles or more from an MSA or NECMA. For antenna heights above 500 feet, the ERP must be reduced in accordance with the tables in §22.905.

[11] The CGSA is generally composed of several cells wherein each cell-base station must not transmit power levels that would exceed the 39 dBu field strength limit at the boundary of the cell.

[12] *See* F.C.C. Report No. R-6406, "Technical Factors Affecting the Assignment of Facilities in the Public Mobile Service," by Roger B. Carey.

[13] McCaw submitted a White Paper in an ex parte presentation in this proceeding. McCaw proposes to permit a cellular licensee to extend its service contour into an adjacent service area in situations where no system licensee has yet been authorized. McCaw's proposal is outside the scope of this proceeding since our proposal was predicated on compliance with the existing limits on field strength at the boundary of the service area. Consequently we cannot consider this matter here. We will treat McCaw's White Paper as a petition for rule making and issue a separate public notice inviting comments on this request.

[14] Sectoring and cell splitting are techniques used to increase cellular system capacity and avoid interference. When a cell is split an additional base station is introduced to the system to form a new cell. The new cell uses cochannel frequencies at shorter distances than was used before cell splitting took place. Thus, frequency reuse is increased which results in increased system capacity. Cell sectoring is a partitioning of a cell with directional antennas in place of the normal omni-directional antennas used at the cell base station. Sectoring permits the use of fewer base stations to cover a service area that has too few subscribers to justify the construction of another base station. Both sectoring and cell splitting are generally performed in conformance with frequency reuse plans designed to avoid interference. Typically, carriers use 4 or 7 cell reuse plans with at least 630 kilohertz between adjacent channels used in the same cell. Since the same frequencies cannot be used in adjacent cells, neighboring carriers coordinate their reuse plans so that different frequencies are used along the CGSA borders. Telocator contends that the use of, for example, one frequency in seven cells would effectively prevent a neighboring carrier from fully using that same frequency, thereby preventing reuse.

[15] For example, the cell could be sectored so that transmissions in the direction of an adjacent cellular system are not on the same frequencies that the adjacent system is using near its boundary. Also, many cellular systems will not require use of all of the 416 channels available for each system. Therefore, we anticipate that in many cases there will be sufficient channels to allow flexibility in selection of frequencies to avoid interference.

[16] Increasing cellular base stations' effective radiated power from 100 watts to 500 watts will not undermine our decision in the *Second Report and Order* in General Docket No. 79-144, 2 FCC Rcd 2064, 2065 (1987), to exclude applicants under Part 22 of the Commission's Rules from having to routinely submit environmental information concerning exposure to RF radiation. 47 CFR §1.1307(b). In that decision, we also decided to exclude all Part 90 applicants, such as Specialized Mobile Radio (SMR) applicants, from that requirement even though SMR licensees are permitted to operate at up to 1,000 watts ERP. *See* Section 90.635 of the Commission's Rules, 47 CFR §90.635. Thus, given the technical similarities between cellular and SMR facilities, continuing to exclude cellular applicants from the requirements of Section 1.1307, despite the increase in permissible power levels, would be consistent with the Commission's conclusions in the *Second Report and Order*. Further, should these changes result in environmental concerns in any particu-

lar situation, those concerns may be brought to the Commission's attention, pursuant to the procedures set forth in Section 1.1307(c).

[17] If agreement is obtained with all neighboring co-channel licensees within 75 miles, the antenna height-power reduction requirements will be waived.

[18] *See* Section 21.100 for the coordination procedure in the Domestic Public Fixed Radio Services, and Section 22.100 for the coordination procedure in the Public Mobile Service. 47 CFR Sections 21.100 and 22.100. These rules are similar in that they call for a formal notification and response procedure that must include detailed technical information and transmitter and receiver characteristics.

[19] Section 22.902(d), Subsections (2) and (3), 47 CFR 22.902(d)(2) and (3), states: "All permittees and licensees shall cooperate fully and make reasonable efforts to resolve technical problems and conflicts that may inhibit the most effective and efficient use of the radio spectrum . . . All permittees and licensees shall make every reasonable effort to avoid blocking the growth of other systems that are likely to need additional capacity in the foreseeable future. Where technical problems are resolved by an agreement or operating arrangement between the parties that would require special procedures to be taken to reduce the likelihood of intersystem interference or would result in a reduction of quality or capacity of either system, the new licensee or permittee shall notify the Commission. Upon making a permissive change, a licensee shall notify the Commission of its frequency usage and report on its coordination as required under this subsection.

[20] The analysis may include a carefully coordinated limited field trial to investigate potential interference.

[21] 47 CFR Section 22.120.

[22] 47 CFR Section 2.961.

[23] Blocking rate as used here is the percent of cellular calls that do not go through due to the unavailability of a communication channel.

[24] *See Notice of Inquiry and Notice of Proposed Rule Making*, CC Docket 79-318, 78 FCC 2d 984 (1980).

[25] Commenting parties generally favoring a marketplace approach include American Telephone and Telegraph Company; Bellsouth Corporation; SNET Cellular, Inc.; Arthur K. Peters, Consulting Engineers; NYNEX Mobile Communications Company; McCaw Cellular Communications, Inc.; International Mobile Machines Corporation; and Northern Telecom Inc. Parties that favored the maintenance of compatibility on all or most channels included PacTel Cellular; Bell Atlantic Mobile Systems, Inc.; Electronic Industries Association Cellular and Common Carrier Radio Section; Ericsson North America Inc.; General Electric Mobile Communications Business; Centel Cellular Company; and Lin Cellular Communications Corporation.

[26] The cellular switch serves as a master controller for the routing of cellular telephone calls.

[27] During August 18-19, 1988, a Digital Cellular Technology Symposium sponsored by the Telecommunications Industry Association was held in Washington, D.C. Digital system proposals were presented by AT&T, Ericsson, IMM, Motorola, Northern Telecom, and General Electric.

[28] Since mobile units communicate with other mobile units through base stations, the base station might be configured to interface with mobile units that transmit with various modulation techniques. Control of the interface could be accomplished by the system switch, allowing different systems the ability to recognize the technology of a given mobile unit. Thus, the switch could direct the base station to activate an appropriate interface.

[29] In its comments, NEC America, Inc. states that NTT in Japan is experimenting with evolutionary analog technology using 7.5 kilohertz and 15 kilohertz channel spacing.

[30] *See Report and Order* in CC Docket No. 86-495, 3 FCC Rcd 214 (1988). BETRS currently is a subcategory of Rural Radio Service that allows local exchange service in rural areas to be provided by using either the 150 MHz and 450 MHz bands on a shared basis with the Public Land Mobile Radio Service, or by using 50 frequency pairs in the 816-821/861-866 MHz bands on a shared basis with the Private Land Mobile Radio Services. BETRS has no specified technology, but involves the use of mobile frequencies in radio loops between a basic exchange telephone subscriber and a telephone company central office. *See* Section 22.2 and Part 22, Subpart G of the Commission's Rules.

[31] In CC Docket No. 79-318, the Commission asserted "federal primacy over the areas of technical standards and competitive market structure for cellular radio service." *Report and Order*, CC Docket No. 79-318, 86 FCC 2d 469, 504-05 (1981). *Aff'd on Reconsideration, Memorandum Opinion and Order*, CC Docket No. 79-318, 89 FCC 2d 58, 95-96 (1982).

[32] *See* Section 22.2 of the FCC Rules.

[33] *See* 47 U.S.C. Section 332(c)(2); H.R. Rep. No. 765, 97th Cong., 2d Sess. 55-56 (1982).

[34] Section 331 (c) of the Communications Act of 1934, as amended, 47 U.S.C. 332(c), reads as follows:

> (c)(1) "For purposes of this section, private land mobile service shall include service provided by specialized mobile radio, multiple licensed radio dispatch systems, regardless of whether such service is provided indiscriminately to eligible users on a commercial basis, except that a land station licensed in such service to multiple licensees or otherwise shared by authorized users (other than a nonprofit, cooperative station) shall not be interconnected with a telephone exchange or interexchange service or facility for any purpose, except to the extent that (A) each user obtains interconnection directly from a duly authorized carrier; or (B) licensees jointly obtain such interconnection directly from a duly authorized carrier.
>
> (c)(2) "A person engaged in private land mobile service shall not, insofar as such person is so engaged, be deemed a common carrier for any purpose under this Act. A common carrier shall not provide any dispatch service on any frequency allocated for common carrier service, except to the extent such dispatch service is provided on stations licensed in the domestic public land mobile radio service before January 1, 1982. (3) No State or local government shall have any authority to impose any rate or entry regulation upon any private land mobile service, except that nothing in this subsection may be construed to impair such jurisdiction with respect to common carrier stations in the mobile service."

[35] With regard to Section 331(c)(2), the Conference Report states:

> "Section 331(c)(2) further specifies that radio dispatch systems are not authorized in the domestic public (common carrier) land mobile service with

the exception of those stations authorized as of January 1, 1982.[2] ([2] Common carriers are presently authorized to provide both "general" and "dispatch" two-way communication services. *See* 47 C.F.R. 22.501(a), (b), (c); 22.911(d) (1981). Only "dispatch" service would not be permitted by the Conference Substitute; neither "general" service nor one-way paging service is affected.) In substance, the bill deregulates dispatch service, except for "grandfathered" common carrier stations and requires that it be provided on an unregulated basis in the private land mobile services. The Conferees are informed that current use of common carrier stations to provide dispatch service is *de minimis*. Thus, while such stations licensed in the domestic public land mobile radio service (47 C.F.R. 22.500, et seq. (1981)) prior to January 1, 1982, may continue to add customers and locations, this limited exception should not impair the Conferees objective of assuring that frequencies allocated for use by radio common carriers are not devoted to dispatch service to any significant extent.

"Nothing in Subsection 331(c), however, should be construed to bar persons who are otherwise licensed as common carriers from providing dispatch service in the private land mobile services; nor should it be construed to impair the ability of common carriers to compete for any class or type of customer for their services. Thus, for example, if a plumber or taxi company or a police department has radio communication needs that can be satisfied through service provided by a cellular radio operator, this section interposes no objection. Moreover, Section 331(c) does not bar common carriers from providing interconnected services or facilities to users or licensees of stations licensed in the private land mobile services, via a base station or through interconnection on the user's premises. Only if a private land mobile operator or licensee is reselling for profit interconnected common carrier services is the interconnection prohibited. This will assure that frequencies allocated essentially for purposes of providing dispatch services are not significantly used to provide common carrier message service."

[36] For example, a cellular operator could reach an agreement with an adjacent operator permitting the adjacent operator to provide an auxiliary service. The agreement could be in the form of a contract that is legally binding on both parties. Such an agreement would ensure that the offering of the secondary nonconventional service would not be disrupted. We anticipate that with the number of channels available for cellular service and engineering techniques available for avoiding interference, cellular systems could be expanded while still avoiding interference to a secondary service offered in the adjacent market. The cellular operator offering a secondary nonconventional technology or service could for instance pay for additional cells or directional antennas in an adjacent system that are necessary to avoid interference to its secondary service. We note that alternative communications are offered successfully on a secondary basis in other services. For example, FM broadcast stations are permitted to offer a wide range of subsidiary services such as functional music, specialized foreign language programs, radio reading services, etc., on a secondary basis. *See* Section 73.295(a) and (c). We understand that service providers often reach contractual arrangements for use of FM subsidiary channels.

STATEMENT OF COMMISSIONER JAMES H. QUELLO DISSENTING IN PART

In re: Amendment of Parts 2 and 22 of the Commission's Rules to Permit Liberalization of Technology and Auxiliary Service Offerings in the Domestic Public Cellular Radio Telecommunications Service (General Docket No. 87-390)

While I support the general liberalization of technology in this docket in the hope that it will encourage new, innovative solutions to present capacity limitations, I cannot support the introduction of "auxiliary" services on cellular frequencies. In the first place, I am far from convinced that there is any demonstrated need to use cellular frequencies for non-cellular services.

In major metropolitan areas, it seems likely that the need for spectrum to accommodate cellular use will preclude the use of cellular spectrum for auxiliary uses. In urban areas where the demand for cellular services is less intense, no general spectrum shortages in specific paging or fixed services have been demonstrated.

If there are instances where a practical solution to a specific problem cries out for non-cellular use of cellular spectrum, the waiver process is always available. Indeed, such situations are the ideal candidates for waiver solutions. Anomalous situations need not be relieved by rules of general applicability.

Therefore, I dissent to that part of the Order authorizing the use of cellular spectrum for auxiliary use.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-140

In the Matter of

Amendment of Part 74 of the	RM-5416
Commission's Rules Concerning FM	RM-5472
Translator Stations	

ORDER REOPENING THE PERIOD FOR FILING COMMENTS

Adopted: December 5, 1988; Released: December 14, 1988

By the Chief, Mass Media Bureau:

1. By this *Order*, we are reopening the above-captioned proceeding to afford parties an opportunity to comment on a study of radio listening behavior submitted by the National Association of Broadcasters (NAB) on November 4, 1988. In its reply comments in this proceeding, NAB contended that an empirical analysis included in the initial comments filed by the staff of the Bureau of Economics of the Federal Trade Commission (FTC) used misleading data and did not address the relevant issues. It also indicated that it intended to further respond to the FTC study by undertaking its own study. However, because access to the detailed data needed to conduct such a study would not be available until after the deadline for filing reply comments, NAB stated that it would subsequently submit a supplement to the record. It now has filed its study and a motion requesting that the Commission accept its supplemental submission. MHS Holdings, Ltd., has filed an opposition to the request for acceptance of NAB's supplement on the grounds that the Commission denied its earlier request for an extension of time for filing reply comments.[1] An opposition to the request for acceptance of NAB's supplement also was submitted by John S. La Tour who contends that this submission is merely a late-filed comment.

2. While we indicated at the outset of this proceeding that we would be disinclined to extend the time period for filing comments at this stage,[2] we believe that it is appropriate to permit interested parties to comment on the NAB study. Unlike MHS Holdings' request for additional time to respond to arguments presented in the initial comments, NAB's supplemental submission includes information that was unavailable during the original comment period. Thus, we believe that acceptance of this study and any additional comments we receive in response to it will further our objective to develop the most complete factual record possible in order to determine our general FM translator policy. Therefore, we are reopening the comment period in the proceeding. Parties are requested to limit their comments and submissions to the empirical evidence in the studies before us and any other recent data.

3. Accordingly, IT IS ORDERED, pursuant to applicable procedures set forth in 1.415 and 1.419 of the Commission's Rules, That the period for filing comments in the above-captioned proceeding is REOPENED and interested parties may file comments on or before **January 23, 1989**, and reply comments on or before **February 7, 1989**. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington D.C. 20554.

4. Accordingly, IT IS ORDERED that the Motion for Acceptance of National Association of Broadcasters Supplement to Reply Comments IS GRANTED.

5. Accordingly, IT IS ORDERED that the Oppositions to Motion for Acceptance of National Association of Broadcasters Supplement to Reply Comments filed by MHS Holdings, Ltd., and John S. La Tour ARE DENIED.

6. For further information concerning this proceeding, contact Marcia Glauberman, Policy and Rules Division, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Alex D. Felker
Chief, Mass Media Bureau

FOOTNOTES

[1] *See Order Denying Extension of Time* in MM Docket No. 88-140, DA 88-1444, adopted September 15, 1988.

[2] *See Notice of Inquiry* in MM Docket No. 88-140, 3 FCC Rcd 3664 (1988) at para. 63.

before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-541

In the Matter of

Amendment of Section 73.202(b), RM-6472
Table of Allotments,
FM Broadcast Stations.
(Grinnell, Iowa)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 10, 1988; Released: December 13, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Blair Broadcasting Corporation (petitioner), requesting the substitution of Channel 294C2 for Channel 294A at Grinnell, Iowa, and the modification of its construction permit for Station KICL-FM to specify the higher powered channel. Channel 294C2 can be allotted to Grinnell in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.3 kilometers (6.4 miles) northwest to avoid a short-spacing to Station KJJC, Channel 295C2 at Osceola, Iowa, and to accommodate petitioner's desired transmitter site.[1]

2. As requested, we shall also propose to modify petitioner's construction permit for Station KICL-FM to specify operation on Channel 294C2. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in use of Channel 294C2 at Grinnell or require the petitioner to demonstrate the availability of an additional equivalent channel for use by such interested parties.

3. We believe the public interest would be served by proposing the substitution of Channel 294C2 for Channel 2394A at Grinnell, Iowa, since it could enable Station KICL-FM to expand its coverage area. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Grinnell, Iowa	294A	294C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 2, 1989,** and reply comments on or before **February 17, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Lauren A. Colby, Esq.
Debra M. Vaughn-Carrington, Esq.
10 E. Fourth Street
P.O. Box 113
Frederick, Maryland 21701
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments. Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 41-50-15 and West Longitude 92-43-50.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 14, 1988

CINCINNATI BELL TELEPHONE COMPANY FILES REVISIONS TO COST ALLOCATION MANUAL PUBLIC COMMENT INVITED

On November 23, 1988, Cincinnati Bell Telephone Company (Cincinnati Bell) filed revisions to its Part 64 cost allocation manual for the separation of regulated and nonregulated costs. The original manual was filed in 1987 pursuant to the requirements of the Commission's *Joint Cost Order*, 2 FCC Rcd 1298 (1987). The Common Carrier Bureau approved the manual on September 26, 1988, conditioned upon the filing of numerous specified revisions. *See Cincinnati Bell Telephone Company's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs,* DA 88-1464, released September 26, 1988.

Comments on the revisions to Cincinnati Bell's manual may be filed no later than January 3, 1989. Replies should be filed by January 19, 1989. Comments should reference file number AAD 7-1697. A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and to International Transcription Services, Inc., 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800.

Copies of the cost manual revisions may be obtained from International Transcription Services, Inc. Copies are also available for public inspection and copying in Room 812, 2000 L Street, N.W., Washington, D.C. 20554.

For further information contact Alicia Dunnigan at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ROCHESTER TELEPHONE CORPORATION

Petition for Waiver of Section 69.605(c)(2) of the Commission's Rules and Regulations

MEMORANDUM OPINION AND ORDER

Adopted: December 5, 1988; Released: December 14, 1988

By the Deputy Chief, Common Carrier Bureau:

I. BACKGROUND

1. On August 19, 1988, Rochester Telephone Corporation (Rochester) filed the captioned petition for waiver of Section 69.605(c)(2) of the Commission's Rules, 47 C.F.R. § 69.605(c)(2), to permit Rochester's average schedule exchange carrier subsidiaries to compute costs on an average schedule basis "in a pool of Rochester exchange carrier affiliates" after those subsidiaries withdraw from the National Exchange Carrier Association (NECA) Common Line pool.[1] Rochester currently has four average schedule subsidiaries and expects to complete acquisition of a fifth before the end of the year.[2]

2. Rochester notes that Section 69.605(c)(2) will require it to convert its average schedule companies to cost status when Rochester and its affiliates withdraw from the common line pool effective April 1, 1989. Rochester plans to have its average schedule companies concur in Rochester's depooled common line tariff and in NECA's traffic-sensitive (TS) tariff after April 1, 1989. [3] Rochester asserts that this would simplify its withdrawal from the pool and would minimize the potentially disruptive effects of the new common line cost recovery system on its average schedule companies. Rochester contends that permitting its affiliates to compute costs on an average schedule basis would not adversely affect other unaffiliated carriers because its average schedule companies would pool and settle only with its affiliated carriers. In addition, Rochester believes that the inclusion of the costs of the average schedule companies would have "a relatively modest impact" on the averaged carrier common line (CCL) rate to be assessed by the local exchange carriers (LECs) participating in the Rochester pool.[4] Rochester also argues that grant of its petition would be consistent with the Commission's efforts to grant small carriers greater flexibility in establishing their rates for interstate access services.[5]

3. Rochester notes that denial of its petition would require its average schedule companies to perform jurisdictionally separated cost studies for the first time and asserts that the costs of these studies would have to be recovered from interstate services. Rochester also observes that there is "no assurance that these cost studies would reduce the interstate revenue requirements of the affected carriers."[6] Finally, Rochester states that conversion of its average schedule companies would complicate the administrative problems that Rochester would face in developing a common line tariff.[7]

II. COMMENTS

4. By a public notice released September 2, 1988, we requested comment on Rochester's petition. ALLTEL Corporation (ALLTEL) filed comments in support of the petition and Rochester filed reply comments. No other party commented. ALLTEL asserts that the Rochester petition "is premised on the fact that there are substantial differences among holding companies in terms of the range of cost characteristics of individual operating companies and/or study areas under a single holding company ownership umbrella."[8] ALLTEL argues that the petition requests a flexible regulatory response for the specific situations faced by the Rochester companies. ALLTEL also asserts that the fact that Rochester has voluntarily undertaken what it terms inter-study area subsidization cannot legitimize action by the Commission to force other holding companies (such as ALLTEL) to do likewise.

5. In its reply comments, Rochester contends that the fact that its petition was unopposed argues in favor of granting its request. Rochester also reiterates the arguments it made in its petition.[9] Finally, Rochester notes that it intends to withdraw all of its LECs from the NECA common line pool regardless of the disposition of its petition.[10]

III. DISCUSSION

6. We find that Rochester has not demonstrated a sufficient basis to warrant grant of the waiver requested in its petition, but we are granting a more limited waiver of data requirements for the next annual access tariffs. Rochester has marshalled several arguments in support of its petition. These arguments are not wholly without merit. For example, it appears that Rochester is correct in its assertion that its proposal would not affect unaffiliated LECs. Moreover, Rochester's plan is not inconsistent with recent Commission actions to grant greater flexibility to small carriers in the recovery of their interstate access revenue requirement.[11]

7. Nevertheless, we do not find Rochester's arguments sufficient to warrant waiver of our general rule. Rochester has neither cited particular facts that warrant departure from the Commission's general rule nor demonstrated that its proposal would promote more effective implementation of policy.[12] Although ALLTEL may be correct in its assertion that each company has distinct cost characteristics, Rochester has not demonstrated unique attributes that distinguish it from other companies.

8. More fundamentally, Rochester does not demonstrate how grant of its petition would promote more effective implementation of overall policy. Rochester does not address the underlying purposes of the rule. We conclude that Rochester's proposal would not advance, and might actually impede, the accomplishment of the goals of the Commission's access charge rules generally and of Section 69.605(c)(2) of the Commission's rules, as applied to the common line depooling program, in particular. For example, an important aspect of the forthcoming common line pooling changes is that carriers leaving the pool will have greater incentives to reduce common line costs than

they would in a pooled environment. Such cost reductions will be reflected in the common line rates those carriers charge their access customers. Retention of the non-cost-based average schedule settlement scheme for carriers that leave the pool would, in our view, tend to erode this process and thus reduce some important benefits of the pooling modifications.[13]

9. Section 69.605(c)(2) serves other important purposes as well. The rule establishes a centralized structure for the administration of the average schedules. NECA devises the average schedule formulas based on nationwide data and proposes revisions to the schedules as necessary. As part of this process, NECA must evaluate data provided by various LECs, like the Rochester companies, that participate in the average schedules. It is not clear whether NECA would continue to serve this function under Rochester's proposal. In addition, NECA collects and disburses the revenue for this group of carriers. By departing from this structure, Rochester's proposal potentially could complicate NECA's task of developing the average schedules and could further complicate our task of assuring that the average schedule settlements are properly developed and distributed.[14]

10. Nevertheless, although we find that Rochester has not made a sufficient showing to justify grant of its petition, we are mindful of the potential hardship that might be caused if Rochester were required to perform cost studies for its average schedule companies in time for the upcoming annual access filing. Accordingly, in view of the dynamic environment that currently prevails in the telecommunications industry and specifically the imminent commencement of common line depooling, we will waive Section 61.38(b)(1) of the rules, 47 C.F.R. § 61.38(b)(1), to the extent that it would require Rochester to submit data based on cost studies for its subsidiaries that are currently average schedule companies to support the tariffs it will file to become effective on April 1, 1989. Pursuant to this waiver, Rochester will be able to use the average schedule settlements that its subsidiaries would have received had they remained in the NECA pool as an element of its depooled revenue requirement. This waiver applies only to this annual filing, however, and is based solely on our desire to avoid imposing undue hardship on Rochester in developing its initial tariffs implementing common line depooling.[15] We believe that, before the next annual access tariff filing, Rochester should be able to perform cost studies on a timely basis and file cost data that complies with all applicable Commission rules.

IV. ORDERING CLAUSE

11. Accordingly, IT IS ORDERED that the petition for waiver filed by Rochester Telephone Corporation IS DENIED.

12. IT IS FURTHER ORDERED that Section 61.38 of the Commission's rules, 47 C.F.R. § 61.38 IS WAIVED to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau(

FOOTNOTES

[1] Rochester Petition at 1. Section 69.605(c) of the Commission's Rules establishes eligibility criteria for average schedule companies. Section 69.605(c)(2) states that "[a]ny company that does not join in association tariffs for all access elements shall not be deemed to be an average schedule company." Another portion of this rule has been remanded to the Commission for further consideration. *See* ALLTEL Corp. v. FCC, 838 F.2d 551 (D.C. Cir. 1988) (remanding Section 69.605(c)(1)). The validity of the requirement that average schedule companies participate in NECA tariffs is not at issue in that proceeding.

[2] *Id.* at 1.

[3] *Id.* at 2-4.

[4] Rochester estimates that inclusion of the "costs" (as calculated under "current NECA average schedules") of its average schedule companies in the revenue requirement of the Rochester common line pool would increase its system-wide common line rate by approximately 0.16 cents if the common line charge were applied solely to terminating minutes of use. Thus, Rochester concludes, its proposal would not significantly increase the risk of bypass in its service territories. *Id.* at 7.

[5] *Id.* at 5.

[6] *Id.* at 6.

[7] *Id.*

[8] ALLTEL Comments at 1.

[9] Rochester Reply Comments at 1-4.

[10] *Id.* at 4-5.

[11] *See* Regulation of Small Telephone Companies, CC Docket No. 88-467, 2 FCC Rcd 3811 (1988). It is no doubt also true, as ALLTEL contends, that different companies have different cost characteristics. Neither this fact, however, nor the fact that no party filed comments opposing Rochester's proposal, is dispositive.

[12] The Court in *WAIT Radio* noted that an agency may take such considerations into account in determining whether waiver is appropriate. *See* WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969).

[13] We also note that withdrawal from the common line pool is entirely voluntary, and Rochester has already decided to withdraw from the NECA pool without regard to our disposition of the instant petition.

[14] These and other matters would also introduce further complexity into our evaluation of the reasonableness of Rochester's common line rate.

[15] The relief we are granting, in effect, allows Rochester to implement its proposal for one access tariff year.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Rochester Telephone Corporation's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs	AAD 7-1691

MEMORANDUM OPINION AND ORDER

Adopted: December 2, 1988; Released: December 13, 1988

By the Chief, Common Carrier Bureau:

Table of Contents

	Paragraph
I. Introduction and Background	1-4
II. General Issues	
A. Overall Sufficiency of the Manual	5-6
B. Nonregulated Activities	7
C. Incidental Activities	8-9
D. Affiliate Transactions	10-14
E. Employee Time Reporting	15-17
F. Joint Use of Network Plant	18-19
III. Account - by - Account Analysis	20-21
A. Accounts to be Added	22-23
B. Specific Accounts	24-40
IV. Procedural Issues	41-46
V. Ordering Clauses	47-48

I. INTRODUCTION AND BACKGROUND

1. On August 28, 1987, Rochester Telephone Corporation (Rochester) filed a cost allocation manual pursuant to the *Joint Cost Order* [1] governing the accounting separation of Rochester's regulated and nonregulated costs. Consistent with the requirements of the *Joint Cost Order*, Rochester implemented the manual on January 1, 1988, concurrent with the implementation of the revised Uniform System of Accounts (USOA).[2] The manual includes a list of Rochester's nonregulated activities, a list of activities Rochester treats as incidental to regulated activities for accounting purposes, information on affiliate transactions, information on employee time reporting, and information describing how each revised USOA account is allocated between regulated and nonregulated activities.

2. Two parties filed comments on Rochester's manual, and Rochester filed a reply. [3] In addition to reviewing the pleadings, we have conducted our own review of the Rochester manual to determine its consistency with the Commission's rules and policies. We have concluded that while the Rochester manual is deficient in some respects, its format and content generally provide the Common Carrier Bureau (Bureau) with a sufficient understanding of the proposed cost allocation procedures to permit us to make an informed judgment as to the ability of the manual to discourage cross subsidy. We conclude that, overall, Rochester's manual provides sufficient assurance against the misallocation of costs and revenues to permit Rochester to continue to apply its manual pending submission of a revised manual that meets all Commission requirements.

3. We require that Rochester specify in greater detail the procedures it intends to follow in apportioning the costs and revenues of regulated and nonregulated activities, and, in certain instances, that Rochester correct ambiguities and omissions in its manual. We require Rochester to submit revisions to its manual, and we shall solicit public comment on them. Any revisions to the manual that result from the instant Order should be made effective retroactive to January 1, 1988, to the extent possible.[4] We therefore approve Rochester's cost allocation manual subject to a number of conditions and requirements for the submission of further information.

4. This Order is divided into three substantive sections. Section II discusses general issues, including issues regarding the portions of the manual that relate to nonregulated activities, incidental activities, affiliate transactions, and employee time reporting. Section III discusses issues raised in connection with the proposed apportionment methods and specific accounts. Section IV discusses certain procedural requirements for updating cost allocation manuals.

II. GENERAL ISSUES

A. Overall Sufficiency of the Manual

5. The *Joint Cost Order* listed five types of information that must be included in cost allocation manuals: (a) a description of each nonregulated activity; (b) a list of all the activities the company now accords incidental accounting treatment, and the justification for treating each as incidental; (c) a chart showing all corporate affiliates; (d) a statement identifying affiliates that engage in or will engage in transactions with the carrier entity and describing the nature, terms and frequency of such transactions; and (e) for each USOA account and subaccount, detailed specifications of the cost categories (or cost pools) to which amounts in the account or subaccount will be assigned, and of the allocation method for each cost category (or pool).[5] In addition, the manuals must describe the methods used to teach, monitor, and enforce accurate time reporting, as well as the methods for capturing and allocating the costs of nonproductive time.[6]

6. Generally, we find that Rochester's manual contains cost accounting procedures that are adequate to meet our requirements and that are at a level of detail necessary for us to conclude that the manual's procedures will discourage cross subsidy. Moreover, we believe that, overall, Rochester's manual will provide an adequate basis for Commission audits. We note, however, that a number of ambiguities and omissions exist in the manual that must be corrected by the submission of additional information and amendments. We do not believe, however, that these omissions or other defects in Rochester's manual require

its rejection. Instead, we believe the best procedure is to permit Rochester to continue to implement its manual, while requiring it to make revisions. Our approval of Rochester's manual, therefore, is conditioned upon the timely submission of revisions responsive to the matters discussed in this Order.

B. Nonregulated Activities

7. The Rochester manual provides the requisite description of Rochester's nonregulated activities.[7] Rochester lists eight types of nonregulated activities that it offers: (1) Inside Wiring, consisting of installation, rearrangement and maintenance of inside wire; (2) Sales, service and leasing of terminal equipment; (3) Telephone Answering Service whereby Rochester answers calls, screens messages and relays any messages to the customer; (4) Voice Mail Service that allows customers to record, keep, receive, give and answer messages and distribute them to other users on the system; (5) Engineering Consulting in which Rochester provides consultation and acts as general contractor on a consulting basis in conjuction with sales of large private telecommunications systems; (6) Packet Switching from premise to premise in which a switched data network service functions by interfacing customer terminals or host computers with an access concentrator at the central office; (7) Radio Services operation which encompasses the sale, installation and maintenance of all radio services including paging equipment, two-way radios, and improved mobile telephone service (IMTS) units; and (8) Construction and maintenance of fiber optic cable systems for specific customers. Neither of the parties commented on Rochester's nonregulated activities, and our review of these activities confirms that Rochester has met the requirements of the *Joint Cost Order* on this matter.

C. Incidental Activities

8. Rochester's manual also provides, as required, a list of nonregulated activities that are offered on an incidental basis to regulated activities.[8] In the *Joint Cost Order*, the Commission permitted carriers to account for incidental activities as regulated activities, provided that each of the activities meets the following quantitative and qualitative tests: (a) the activity must be an outgrowth of regulated operations; (b) it cannot constitute a separate line of business; (c) it must have traditionally been treated as incidental for accounting purposes; and (d) the revenues from all of a carrier's incidental activities must not exceed one percent of its total revenues.[9]

9. Our review of the incidental activities section of Rochester's manual[10] indicates that Rochester has met the requirements of the *Joint Cost Order* on this matter.

D. Affiliate Transactions

10. The *Joint Cost Order* establishes specific rules governing the provision of assets and services to and from affiliates. These rules were adopted in order to discourage carriers from avoiding the cost allocation rules through affiliate transactions. For example, if a carrier wished to cross subsidize a nonregulated activity, it could, in the absence of the affiliate transaction rules, engage in that activity through a separate but affiliated company which would receive assets or services from the carrier at prices less than the carrier's fully distributed costs. The affiliate transaction rules specify the valuation standards that will be applied in accounting for transactions between a carrier and its affiliates. Those rules vary depending upon whether the transaction involves assets or services.[11] The *Joint Cost Order* also required that carriers include in their cost allocation manuals "[a] statement identifying affiliates that engage in or will engage in transactions with the carrier entity and describing the nature, terms, and frequency of such transactions."[12]

11. The NYDPS is concerned that services provided to Rochester by its affiliates be provided at the market rate, rather than at cost, if the same service is also provided to non-affiliated entities.[13] It argues that New York law provides that affiliates may not charge a rate higher than the reasonable cost of performing such service, and it recommends that the Commission adopt a cost rate standard rather than a market rate standard for all purchases from affiliates.[14] Rochester responds that this concern has been mooted by the Commission's order on reconsideration, in which market pricing of purchases from affiliates is permissible only if there is a price list, tariff or generally available price which the Commission can see has not been manipulated in any way.[15]

12. In the *Joint Cost Order*, the Commission found that the price of services ought to be determined by either a federally-tariffed rate or a rate on file with a state commission. If such a rate does not exist, but the affiliate provides the service to third parties, the prevailing price should be used to determine the price charged to affiliates. When neither of these rates exist, carriers are required to record those services at a cost determined in a manner that complies with the cost allocation standards and procedures set forth in the Commission's rules.[16] In the *Order on Reconsideration*, the Commission affirmed this point by indicating that it views this requirement as essential to the integrity of its cost allocation rules.[17] The issue of market based pricing thus has been fully addressed in past Commission orders, and Rochester's manual in this regard is in full compliance with those decisions. Thus, we decline to require the change that NYDPS requests.

13. Rochester's manual contains a section that lists and briefly describes the affiliates with which Rochester has transactions, and the nature and frequency of these transactions.[18] Our review of this section reveals that in some cases Rochester proposes to utilize procedures established by the NYDPS. For example, in the case of Rotelcom Inc., from which Rochester purchases a variety of telecommunications equipment, Rochester states that it must demonstrate to the NYDPS that central office equipment could not have been obtained from a different supplier for less money.[19] Additionally, for services provided by Rochester to its affiliates, Rochester states that corporate administrative costs not directly assigned are charged to affiliates in accordance with procedures developed in conjunction with and approved by the NYDPS.[20] As stated in the *Joint Cost Order*, the Commission is not limiting the states in the way in which they regulate the intrastate rates of the subject carriers.[21] The carrier, however, must demonstrate that these rules are consistent with those established by this Commission for interstate services. We require Rochester to do so in its revised manual. We also note that Rochester states that affiliates are charged a proportionate share of the corporate administrative costs incurred by Rochester. Rochester does not state, however, how this proportionate share is determined. We require Rochester to do so in its revisions.

14. Additionally, in some cases, it is not clear from Rochester's descriptions of its transactions with affiliates whether the asset or service rules apply. For example, under the heading of transactions with Rochester Telephone Mobile Communications (RTMC), Rochester indicates that RTMC provides services and equipment to Rochester and its affiliates. Service charges are charged at tariffed rates. It is not clear, however, what method is used for equipment, which we assume is an asset. Rochester must amend its manual to correct this ambiguity with regard to each of its affiliate transactions.

E. Employee Time Reporting

15. The *Joint Cost Order* permits carriers to select from among several methods of recording employee time. The Commission reasoned that, since the use of wages and salaries would serve as an important technique in the allocation of costs, it was important that carriers use accurate methods of recording employee time. The Commission further found that no one time reporting system would provide accurate results in all situations. Carriers are therefore free to propose the use of positive time reporting or exception time reporting, or to develop special studies to keep track of employee time. The *Joint Cost Order* also required that carriers include in their manuals a description of the methods used to teach, monitor and enforce accurate time reporting. In addition, carriers must describe methods used to capture the costs of nonproductive time and the methods used to allocate those costs.[22]

16. In its cost manual, Rochester proposes using primarily two time reporting methods: (1) positive time reporting and (2) exception time reporting.[23] In addition, survey time reporting is used where time is sampled through various methodologies to determine the relative amount of time spent on specific functions. There were no comments filed regarding Rochester's time reporting procedures and methods.

17. Our review of Rochester's treatment of employee time reporting shows that Rochester must provide additional information on this matter in its revised manual. Initially, while Rochester identifies groups of employees to which various time reporting methods apply, it indicates that as a general rule, management employees are not required to complete daily time sheets. Management salaries are charged to the appropriate account codes based on account distribution data incorporated in the payroll system.[24] Rochester should explain and justify why this method, which is unrelated to the time spent by management on a project which is either regulated or nonregulated, is the most acceptable way in which it can record management time. In addition, Rochester must amend its manual to explain clearly how this process operates. Finally, Rochester explains that Rochester Tel Business Marketing Corporation (RTBMC) provides sales/marketing services to Rochester and all of its affiliates. Time sheets are used by non-management sales personnel and Project Reports prepared by management sales personnel identify the customer, the nature of the sales activity and the benefitting company to be charged. This data is used as the basis to assign payroll and related costs, including supervision and administration, to the appropriate company and, within Rochester, to the regulated and nonregulated entity.[25] Rochester should explain why the data submitted by its non-management and management sales personnel closely approximates the time of supervisory and administrative personnel.

F. Joint Use of Network Plant

18. In the *Joint Cost Order*, the Commission established that jointly-used network plant (central office equipment and outside plant) must be allocated based on a forecast of the peak relative nonregulated usage of the plant over its entire depreciable life. The Commission elected to adopt a forecasted use approach in order to reflect the nature of capital investment decisions, *i.e.*, that investment decisions are made in anticipation of future use.[26] On reconsideration, the Commission reduced the length of the forecast period to three years in recognition of the practical difficulties of forecasting relative use over a lengthy depreciation period.[27]

19. In its manual, Rochester states that the application of investment allocation techniques based on projected usage over the life of the investment is not currently used because common central office and outside plant investment for nonregulated activities will be charged at tariff rates.[28] In its comments, IBM notes that although Rochester does not currently intend to use network plant jointly, and will provide transmission services used in its own nonregulated activities at tariffed rates, it should be required to revise its cost manual to implement the principle of allocation of investment risks before it begins to share investments.[29] In its reply, Rochester argues that IBM is merely restating the position it took on reconsideration, and further, IBM's comments are irrelevant since tariff rates are used for these services.[30] We agree with Rochester that since tariff rates are being charged for these services, IBM's concerns are inapplicable. At such time when Rochester revises its operation resulting in other than tariff rates being used, we would expect Rochester to utilize a three year forecast period as the basis for its allocator.

III. ACCOUNT - BY - ACCOUNT ANALYSIS

20. Rochester's manual describes the methods it proposes to use to derive cost pools and to apportion costs between regulated and nonregulated activities. Rochester provides its format, cost definitions, definitions of its apportionment bases and a summary of the USOA accounts. Additionally, Rochester provides apportionment information in table format.[31] The NYDPS indicates that, pursuant to the Commission's guidelines, the Rochester cost manual is designed so that all costs not specifically allocated to nonregulated activities or included as common costs are allocated to regulated activities.[32] This arrangement, according to NYDPS, will result in cross subsidization of nonregulated activities by regulated activities. Rochester replies that NYDPS's comments reflect disagreement with the Commission's *Joint Cost Order* rather than with Rochester's implementation of the *Joint Cost Order* through its manual.[33] In addition, Rochester asserts that by definition, if a cost is not directly or indirectly attributable to any nonregulated activity, and if that cost is not a common cost allocable to regulated and nonregulated activities, it must be regulated. As a result, Rochester states NYDPS's argument is merely an assertion that there will be errors in the cost allocation process, not that the process is improper.[34] We agree with Rochester on this matter. Furthermore, we believe that the Commission has

already resolved the cost allocation arguments raised by NYDPS herein in the *Joint Cost Order* and the *Order on Reconsideration*.

21. We have reviewed Rochester's manual and identified additional issues to be resolved. Before discussing these specific account issues, however, we will note several required accounts that are not included in Rochester's manual.

A. Accounts To Be Added

22. In the *Joint Cost Order*, the Commission required that carriers submit allocation proposals for each USOA account and subaccount.[35] Since that requirement would have mandated the allocation of amounts that are not used in the jurisdictional separations and interstate ratemaking processes, the *ARMIS Order* eliminated the allocation requirement for particular accounts.[36] Appendix C to the *ARMIS Order* listed for the first time the particular USOA accounts and subaccounts that would be subject to joint cost reporting. In addition, the Commission required carriers to report on six additional accounts used in the interstate ratemaking process. These additional accounts are: Account 2004 - Telecommunication Plant Under Construction-Long Term, Account 2441 - Conduit Systems, Account 4120 - Other Accrued Liabilities, Account 4360 - Other Deferred Credits, Account 5050 - Customer Premises Revenue, and Account 7150 - Gains and Losses from Disposition of Land and Artworks.[37]

23. Because the list released in the *ARMIS Order* was not available until after Rochester filed its manual, the manual omits many accounts contained on that list. The manual also omits three of the six accounts listed above: Account 4120 - Other Accrued Liabilities, Account 4360 - Other Deferred Credits and Account 5050 - Customer Premises Revenues. We direct Rochester to amend its manual to include allocation proposals for each of the omitted accounts. If, in making these revisions, Rochester finds that there are accounts for which it has nothing to report, it must list these accounts in its manual and indicate that it has nothing to report.

B. Specific Accounts

Account 1439 - Deferred Charges and Account 4120 - Other Accrued Liabilities

24. Rochester proposes three cost pools for Account 1439, "Engineering," "Equal Access" and "Other." Rochester must establish a fourth cost pool for this account to reflect the cost of compensated absences. Additionally, for Account 4120, which Rochester does not include in its manual, but must include in its revisions, a cost pool for liabilities relating to compensated absences must be created.

Account 2116 - Other Work Equipment

25. In the "Comments" column accompanying this account, Rochester states that, "Charges to the indicated cost pools are a function of the voucher system account distribution process." In its revisions, Rochester must clarify the meaning of this statement and relate it to a specific section of the manual where this process is discussed.

Account 2124 - General Purpose Computers and Account 6124 - General Purpose Computer Expense

26. Rochester proposes to apportion the "Data Center" cost pools of both of these accounts to regulated and nonregulated activities on the basis of studies that analyze the Data Center system utilization. In its revised manual, Rochester must describe these studies and explain how they are used to apportion costs between regulated and nonregulated activities.

Accounts 2211 through 2232 - Central Office Investment and Accounts 6211 through 6232 - Central Office Expenses

27. Rochester proposes, with two exceptions,[38] to have one cost pool for each of these accounts, which it will assign directly to regulated activities. Rochester includes the phrase, "Provided under Tariff rates" in the "Comments" column associated with these accounts. In its revisions, Rochester should explain the meaning of this phrase.

Accounts 2411 through 2441 - Cable and Wire Facilities and Accounts 6410 through 6441 - Cable and Wire Facilities Expenses

28. As with the accounts discussed in the previous paragraph, Rochester proposes one cost pool for each of these accounts, which it will assign directly to regulated activities. In the "Comments" column associated with each investment account, Rochester states that, "Investment associated with presently identified nonregulated activities is provided under existing tariffs."[39] Here again it appears that because some of the investment and expenses in these accounts are for nonregulated services that are provided at tariff rates, Rochester has determined that these costs need not be included in its manual. Rochester is incorrect. It must amend its manual to establish cost pools in each account for costs associated with nonregulated services, and assign those costs directly to nonregulated activities.

Account 2681 - Capital Leases and Account 2682 - Leasehold Improvements

29. Rochester states that both of these accounts will be allocated to regulated and nonregulated activities on a basis "similar" to that used to allocate the corresponding purchased assets. Rochester must clarify the meaning of the term "similar" in this context. If it means "identical," it must amend its manual to so state. Otherwise, it must amend its manual to explain the allocation procedures for these accounts.

Account 6112 - Motor Vehicle Expense and Account 6113 - Aircraft Expense

30. Rochester proposes to apportion the residual expenses in these accounts to regulated and nonregulated activities based on the "function supported." Rochester is directed to amend its manual to describe the various functions that will be supported by these residual expenses.

Account 6362 - Other Terminal Equipment Expense

31. Rochester will have one cost pool for this account which it will assign directly to regulated activities. Rochester must amend its manual to establish in this account a cost pool for its expenses related to its provision of inside wire, and directly assign the costs in that pool to nonregulated activities. In this connection, Rochester must also delete from its cost manual the entry entitled Ac-

count 6321 - Customer Premises Wiring. There is no such account under our rules. The expenses contained in that account should be included in the inside wire cost pool to be established under Account 6362.

Account 6512 - Provisioning Expense

32. Rochester proposes to have one cost pool for this account that it will apportion to regulated and nonregulated activities on the basis of the general allocator. It appears, however, from statements in the "Comments" column associated with this account that most of the costs will be cleared to construction or plant accounts, while only the residual expenses will be apportioned based on the general allocator. Rochester is directed to amend its manual to clarify how the cost pool will be established for this account and how these costs will be apportioned to regulated and nonregulated activities.

Account 6531 - Power Expense and Account 6532 - Network Administration Expense

33. Rochester will apportion the "Common" cost pool in Account 6531 and all of Account 6532 to regulated and nonregulated activities on the basis of relative regulated and nonregulated investment in central office and outside plant equipment. It is unclear why Rochester is apportioning these costs in this manner. In the revisions to its manual, Rochester is directed to explain its reasoning for using these procedures.

Account 6533 - Testing Expense

34. Rochester states that it will conduct a "periodic study" of work related activity to provide for an allocation of testing expenses among various functions. In its revised manual Rochester must describe this "periodic study" and explain how it is used to provide for allocation procedures.

Account 6711 - Executive Expense and Account 6712 - Planning Expense

35. Rochester proposes to apportion the expenses in these accounts based on the general allocator. Rochester must attempt to assign or attribute these costs either directly or indirectly before using the general allocator. The general allocator should be used only if costs cannot be assigned or attributed on some cost causative basis. We believe that a substantial portion of these accounts can be assigned or attributed.

Account 6722 - External Relations

36. Rochester includes "corporate advertising" in an "External Relations" cost pool of this account, and apportions it on the basis of the general allocator. Rochester's use of the general allocator to apportion these expenses is incorrect. The Commission created a marketing allocator to be used to apportion unattributable marketing costs. Rochester is directed to amend its manual to use the marketing allocator to apportion "corporate advertising." Additionally, Rochester assigns the "Regulatory Matters" cost pool of this account directly to regulated activities. We require Rochester to amend its manual to apportion some of the expenses in this cost pool to nonregulated activities to reflect its contact with regulatory authorities concerning nonregulated activities.

Account 6723 - Human Resources Expenses

37. Rochester will apportion the "Employee Communications" cost pool in this account on the basis of the general allocator. We believe that a more cost causative apportionment method, such as number of employees or salaries and wages, can be used for this cost pool. Rochester is directed to amend its manual to reflect this change.

Account 6725 - Legal Expenses

38. Rochester proposes to have one cost pool for this account which it will apportion to regulated and nonregulated activties based on time reporting. This appears not to be a sufficiently cost causative procedure. We require that Rochester create four cost pools for this account, "regulated," "nonregulated," "common" and "overhead." The first two cost pools should be directly assigned based on time reporting, while the "common" cost pool may be allocated using the general allocator. The "overhead" cost pool, which should include such expenses as law library and general research costs would be apportioned in the same proportion as its directly assigned legal expenses. Rochester shall amend its manual accordingly.

Account 7220 - Operating Federal Income Taxes, Account 7230 - Operating State and Local Income Taxes, and Account 7250 - Provision for Deferred Operating Income Taxes

39. As an initial matter, Rochester states that Account 7230 - Operating State and Local Income Taxes is "Not Applicable To Rochester." Rochester must provide an explanation for this comment. We also note that Rochester proposes to apportion current federal income taxes on the basis of "relative value of pre-tax income," while deferred taxes will be apportioned based on "relative investment value of plant in service," "total company wages and salaries" or the "general allocator."

40. Applying different apportionment bases to these accounts could result in assignments of these costs that are not consistent with the related book income. The net book taxes resulting from these accounts should reflect normalized taxes based on book income, since under revised USOA, interperiod tax allocations are used for accounting purposes. If these accounts are allocated based on a specifically-defined book income, the taxes apportioned should result in an appropriate distribution between regulated and nonregulated activities. We believe that book income should be operating book income before taxes minus interest expense. Our proposed methodology ensures that the costs are being allocated in a straightforward manner, and better reflects the costs being allocated -- income taxes. Rochester is directed to amend its manual to conform with our methodology.

IV. Procedural Issues

41. In this section we address two procedural issues affecting Rochester's cost allocation manual. These issues are: (a) the submission of a revised manual in compliance with this Order, and (b) the routine submission of future amendments to the manual.

42. *Revised manual.* We have required Rochester to submit several amendments clarifying and changing many of its cost apportionment procedures. We have also directed Rochester to submit additional information concerning its affiliate transactions and time reporting mechanisms. In many cases, the additional information

requested is needed to form a judgment concerning the reasonableness of Rochester's proposed methods. In the *Joint Cost Order*, the Commission specifically provided for public comment on the manuals so that a determination on their compliance with Commission requirements would be based on a full record and also so that the cost allocation methodologies would be exposed to public scrutiny prior to their implementation.[40] Similarly, we believe that our review of Rochester's amendments will be aided by public comment on the revisions.

43. We will evaluate the proposed revisions, as well as the comments that we receive, before issuing an order approving or disapproving the amendments. If we disapprove a proposed revision, we shall take whatever further action is required, including mandating specific allocation methodologies or other procedures, consistent with our delegated authority to implement cost allocation manuals. In addition, to facilitate our review of the updated manual and its availability to the public, Rochester shall file two updated copies of its revised manual with the Commission in looseleaf form with numbered and dated pages, within 60 days of the release date of this Order.[41] When amendments are submitted, each revised page must clearly indicate the word "REVISED" and the date next to the page number. All amended language must be indicated by a vertical line in the right margin of the page.

44. *Routine amendments*. We also must resolve the issue of the procedures Rochester will be required to follow when updating its cost allocation manual. We conclude that Rochester will be subject to the same requirements that we imposed on the Bell Operating Companies (BOCs).[42] As we have determined in the BOC context, we recognize that the accuracy of different sections of the manual will have different effects on our ability to monitor the cost allocation process. Therefore, we will apply the following requirements for the update of Rochester's manual. First, because it is important for the Commission to obtain current information on the cost categories and how these are allocated between regulated and nonregulated activities, several categories of information require our attention before the manual is implemented. These are: (1) changes to the cost categories and their allocation mechanisms, and (2) changes in the way employee time, including nonproductive time, is allocated. Each of these changes in the cost manuals must be submitted at least 60 days prior to implementation. Parties seeking to comment on the proposed amendments will be provided an opportunity to do so prior to implementation and will be notified by public notice of the comment dates. The proposed amendments to the manual will be deemed accepted unless the Bureau, pursuant to its delegated authority, rejects or stays the effectiveness of the change.[43]

45. Second, because other information, such as corporate structure, may not be quite as critical for cost allocation monitoring purposes, we require that Rochester file such changes in a timely manner.[44] A modification to a carrier's cost manual to reflect a corporate reorganization does not require our advance approval and, therefore, does not need to be filed prior to the corporate restructuring. Finally, all other changes to the manual should be submitted quarterly, on March 31, June 30, September 30 and December 31 of each year.

46. We believe that these procedures will ensure that the ongoing process of implementing cost allocations will continue to be conducted according to the requirements in the *Joint Cost Order*. At the same time, they minimize the number of times Rochester must seek prior Commission approval before implementing a change and provides a system to ensure timely review of Rochester's proposals.

V. Ordering Clauses

47. ACCORDINGLY, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. Section 154(i), that the Cost Allocation Manual filed by Rochester IS APPROVED, subject to the conditions noted in this Order.

48. IT IS FURTHER ORDERED that revised copies of the Cost Allocation Manual shall be submitted within 60 days from the release date of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Separation of costs of regulated telephone service from costs of nonregulated activities, *Report and Order*, 2 FCC Rcd 1298 (1987) (*Joint Cost Order*), *modified on reconsideration*, 2 FCC Rcd 6283 (1987) (*Order on Reconsideration*), *modified on further reconsideration*, FCC 88-355 (released November 18, 1988), *petitions for review pending*, Southwestern Bell Tel. Corp. v. FCC, D.C. Circuit No. 87-1764 (filed December 14, 1987); National Tel. Cooperative Ass'n v. FCC, D.C. Circuit No. 87-1771 (filed December 15, 1987).

[2] 47 C.F.R. Part 32.

[3] Comments were filed by: New York Department of Public Service (NYDPS) and International Business Machines Corporation (IBM).

[4] In those instances where Rochester cannot make revisions retroactive to January 1, 1988, it must explain in a cover letter accompanying its revised manual its reasons for not doing so. With regard to those revisions that Rochester claims that it cannot make retroactive, we reserve the right to require retroactivity, or that subsequent adjustments be made to reflect the impact of the lack of retroactivity on 1988 operations.

[5] *Joint Cost Order*, 2 FCC Rcd at 1328. The *Joint Cost Order* uses the term "cost categories" to describe groupings of costs that are homogeneous in nature for cost allocation purposes. The accounting profession's term for "cost categories" is "cost pools." We will use the two terms interchangeably in this Order.

[6] *Id.* at 1321-22.

[7] Rochester Manual at Section V.

[8] *Id.* at Section VI.

[9] *Joint Cost Order*, 2 FCC Rcd at 1328.

[10] Rochester Manual at Section VI-1.

[11] *See Joint Cost Order*, 2 FCC Rcd at 1355; *Order on Reconsideration*, 2 FCC Rcd at 6295. Carriers must value services at the prevailing price, if the service is generally available to the public. If it is not generally available, carriers must allocate the cost of the service pursuant to the cost allocation standards of Section 64.901 of the Commission's Rules. For assets, carriers must record transactions at the prevailing price, if one exists. If

not, carriers must record assets transferred from the affiliate to the carrier at the lower of net book cost or fair market value, while assets transferred from the carrier to the affiliate will be recorded at the higher of net book cost or fair market value. *Joint Cost Order*, 2 FCC Rcd at 1343, 1345, *amended by Order on Reconsideration*, 2 FCC Rcd at 6308-9.

[12] *Joint Cost Order*, 2 FCC Rcd at 1328.

[13] NYDPS Comments at 5.

[14] *Id.*

[15] Rochester Reply at 3.

[16] *Joint Cost Order*, 2 FCC Rcd at 1336.

[17] *Order on Reconsideration*, 2 FCC Rcd at 6297.

[18] Rochester Manual at Section III.

[19] *Id.* at Section III-1.

[20] *Id.* at Section III-2 and III-3.

[21] *Joint Cost Order*, 2 FCC Rcd at 1335.

[22] *Joint Cost Order*, 2 FCC Rcd at 1321-22.

[23] Rochester Manual at Section VII.

[24] *Id.* at Section VII-4.

[25] *Id.* at Section VII-6.

[26] *Joint Cost Order*, 2 FCC Rcd at 1319.

[27] *Order on Reconsideration*, 2 FCC Rcd at 6288.

[28] Rochester Manual at Section IV-3.

[29] IBM Comments at 4, n. 4.

[30] Rochester Reply at 2.

[31] Rochester Manual at Section VIII.

[32] NYDPS Comments at 3.

[33] Rochester Reply at 3.

[34] *Id.* at 4.

[35] *Joint Cost Order*, 2 FCC Rcd at 1328.

[36] Automated Reporting Requirements for Certain Class A and Tier I Telephone Companies, *Report and Order*, 2 FCC Rcd 5770, 5775 (1987) (ARMIS *Order*), *recon.*, FCC 88-311 (released October 14, 1988).

[37] Carriers must include these accounts in future releases of the ARMIS reporting requirements.

[38] Account 2231 - Radio Systems and Account 6231 - Radio Systems Expenses will be appportioned to regulated and non-regulated activities based on wages and salaries, or in the case of paging and mobile radio directly assigned to nonregulated activities.

[39] Rochester's only comment concerning Accounts 6410 through 6441 is the phrase "Follows Investment."

[40] We require Rochester to serve copies of its revised manual on all parties to this proceeding.

[41] One copy will be made available in the Accounting and Audits Division reference room, while the other will be maintained for staff use.

[42] *See, e.g.*, Pacific Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 287 (1988).

[43] A stay of the effectiveness of a proposed change will not extend beyond 180 days.

[44] Of course, changes to corporate structure that also affect cost categories need to be filed in advance of implementation, as discussed *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AUDIO ENTERPRISES, INC., File No. ENF-88-04

Apparent Liability for Forfeiture

ORDER

Adopted: November 29, 1988; Released: December 13, 1988

By the Commission:

1. On July 6, 1988, the Commission released a Notice of Apparent Liability (Notice) against Audio Enterprises, Inc., for apparent violations of Section 223(b) of the Communications Act, 47 U.S.C. § 223(b), as it existed at the time the apparent violations occurred, relating to adult-oriented telephone messages being transmitted over a telephone line leased to Audio Enterprises.

2. Since the release of the Notice, Audio Enterprises and its president, Wendy King (hereinafter "parties"), have engaged in negotiations with the Common Carrier Bureau (Bureau) to produce a fair and expeditious resolution of the above-captioned proceeding in a manner that would serve the public interest. The Bureau and the parties have reached an agreement, the terms and conditions of which are contained in the attached Consent Decree.

3. We have reviewed the terms of the Consent Decree and evaluated the unique circumstances of this case. We believe that the public interest would be served by approving the Consent Decree, the terms of which are hereby incorporated herein by reference.

4. Accordingly, IT IS ORDERED that the Consent Decree, incorporated by reference herein, is hereby adopted.

5. IT IS FURTHER ORDERED that Audio Enterprises and Wendy King shall abide by the terms and conditions of the Consent Decree.

6. IT IS FURTHER ORDERED that the Notice of Apparent Liability Proceeding against Audio Enterprises is hereby terminated.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

ATTACHMENT

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AUDIO ENTERPRISES, INC., File No. ENF-88-04

Apparent Liability for Forfeiture

CONSENT DECREE

1. On July 6, 1988, the Commission released a Notice of Apparent Liability (Notice) in which it found that Audio Enterprises, Inc., was apparently liable for forfeiture to the United States in the amount of 600,000 based on apparent violations of Section 223(b) of the Communications Act, 47 U.S.C. § 223(b), relating to adult-oriented telephone messages being transmitted over a telephone number ((900) 410-6749) leased to Audio Enterprises. Audio Enterprises was directed to pay the forfeiture or respond to the tentative conclusions and questions raised in the Notice. In addition, the Notice ordered Audio Enterprises to produce information with respect to the involvement of individual company employees or officers in committing the apparent violations. The Commission solicited this information in order to determine whether forfeitures against individual employees or officers would be ordered.

2. For purposes of this Consent Decree, the following definitions apply:

a. "Common Carrier Bureau (Bureau)" means the Common Carrier Bureau of the Federal Communications Commission;

b. "Audio Enterprises" means the corporate defendant or any officer, director, or any shareholder acting on behalf of Audio Enterprises in the proceeding that is the subject of this Consent Decree;

c. "Wendy King" means Wendy King as an individual and as a corporate officer, director, employee, or controlling shareholder of either Audio Enterprises or any other corporation;

d. "Notice of Apparent Liability Proceeding" means the investigation and enforcement action, undertaken pursuant to Section 223(b) of the Communications Act, leading to the Notice of Apparent Liability issued against Audio Enterprises and released on July 6, 1988, and including the issuance of any Final Order;

e. "Final Order" means an order of the Commission formally disposing of the Notice of Apparent Liability Proceeding.

f. "Section 223(b)" means Section 223(b) of the Communications Act and any applicable regulations in force as of the date of the violations alleged in the Notice of Apparent Liability. Section 223(b) was amended effective July 1, 1988. "Section 223(b) as amended" refers to Ch. 2, § 6201 of the Augustus F.

Hawkins - Robert T. Stafford Elementary and Secondary School Improvement Act of 1988, Pub. L. No. 100-297, 102 Stat. 424 (1988);

g. "Message services" means the business of providing to a caller via telephone, either recorded messages or live conversations, for which the caller is billed a fee.

h. "Adult-oriented" message services are communications that are obscene or indecent within the meaning given the terms obscene or indecent contained in Section 223(b) or Section 223(b) as amended.

i. "Effective date of this Consent Decree" is the date that the Commission releases its Final Order adopting the terms and conditions of this Consent Decree.

j. "Obscene" means obscene as to adults as defined and applied in relevant United States Supreme Court decisions, notwithstanding the meaning of that term in Section 223(b) and Section 223(b) as amended.

3. Audio Enterprises and Wendy King admit the jurisdiction of this Commission over them and over the subject matter of this action for the purposes of this Consent Decree and any Final Order adopting the terms and conditions of this Consent Decree, acknowledge service upon them of the Commission's Notice of Apparent Liability, and waive the filing of a response.

4. Audio Enterprises and Wendy King agree that the provisions of this Consent Decree shall be incorporated by reference in any Final Order, as described in paragraphs 8 and 11 below, accepting this Consent Decree and terminating the Notice of Apparent Liability Proceeding.

5. Audio Enterprises and Wendy King waive any rights they may have to appeal any Final Order, as described in paragraph 8 and 11 below, accepting this Consent Decree.

6. Audio Enterprises and Wendy King represent as follows: Audio Enterprises stopped providing its adult-oriented recorded message service over the telephone number (900) 410-6749 no later than January 1, 1988. By January 1, 1988, the message format was changed for all other telephone lines over which Audio Enterprises offered adult-oriented message services and the content of these messages was not obscene. Some of these message services were live and others were recorded. By May 1, 1988, Audio Enterprises stopped providing adult-oriented message services altogether. As of July 1, 1988, Wendy King was not an officer, director, employee, or controlling shareholder of any entity offering adult-oriented message services except (i) Telepromo, Inc., which provides a tape-recorded message service requiring that a caller use an access code prior to hearing the message, as well as a live conversation format; and, (ii) Audio Communications, Inc., which requires callers to provide a credit card number prior to engaging in any conversations. Wendy King will complete the process of selling all of her interests in Telepromo, Inc., within 30 days of the effective date of this Consent Decree.

7. In consideration for the termination by the Commission of the Notice of Apparent Liability Proceeding in accordance with the terms of this Consent Decree, Audio Enterprises and Wendy King agree to the following terms, conditions and procedures that the parties believe will facilitate a fair and expeditious resolution of the above-captioned proceeding in a manner which would advance the interests of the parties and would serve the public interest. Audio Enterprises and Wendy King agree to the following terms, conditions and procedures without admitting any of the alleged violations set forth in the Notice of Apparent Liability and without admitting that either has provided message services that are obscene.

a. Audio Enterprises and Wendy King agree to pay 50,000, without further protest, or recourse to a trial *de novo*, within 30 days of the date the Final Order is released or November 20, 1988, whichever date is later.

b. Audio Enterprises and Wendy King agree that they will not provide, individually or together, in the District of Columbia or in interstate or foreign communication, by means of telephone (directly or by recording device), for commercial purposes, (1) any obscene message services to any person, or (2) any indecent message services unless Audio Enterprises and Wendy King restrict minors' access to those messages by (a) requiring payment by credit card or use of an authorized access or identification code before transmission of the message, or (b) scrambling the message such that it requires the use of a descrambler by an authorized party. Audio Enterprises and Wendy King further agree that they will not permit any telephone facility under their control to be used for any activities inconsistent with clauses (1) and (2) of this subparagraph. The requirement set forth in paragraph 7(b)(2) above is null and void if a court of competent jurisdiction in a final, appealable order strikes down the regulation of indecent messages in Section 223(b) as amended and the Commission either does not appeal any such final, appealable order or exhausts any appellate review available to it. It is expressly agreed that compliance with this subparagraph imposes an obligation separate and apart from any obligation of Audio Enterprises and Wendy King to comply with Section 223(b) as amended or other laws or regulations that may in the future govern the provision of adult-oriented message services. Compliance with the terms of this Consent Decree shall not in and of itself constitute a defense to any action brought under the terms of Sections 223(b) as amended or other laws or regulations that may in the future govern the provision of adult-oriented message services. It is further agreed that nothing herein shall limit the authority of the Commission to enforce Section 223(b) as amended or other laws or regulations that may in the future govern the provision of adult-oriented message services against Audio Enterprises or Wendy King after July 1, 1988.

c. Audio Enterprises and Wendy King further agree to file a report every six months for the next five years, commencing six months from the effective date of this Consent Decree, advising the Commission of the telephone numbers that each of them, together or separately, is using, or has used during the six month period prior to the report, for the purpose of providing message services, and indicating the nature of the services and the messages offered over each number as well as the steps they

have taken to comply with the Consent Decree and/or then existing law or regulation governing the provision of obscene or indecent message services.

8. In light of the covenants and representations contained in paragraphs 3-7, *supra*, and in express reliance thereon, the Bureau agrees promptly to present this Consent Decree to the Commission and to recommend to the Commission that it accept the Consent Decree and issue a Final Order terminating the Notice of Apparent Liability Proceeding against Audio Enterprises. The time in which Audio Enterprises may respond to the Notice of Apparent Liability shall be continued pending a decision by the Commission whether or not to accept the Consent Decree. Acceptance by the Commission shall constitute a decision to terminate the Notice of Apparent Liability Proceeding without any finding of liability on the part of Audio Enterprises or Wendy King.

9. In terminating the Notice of Apparent Liability Proceeding, the Commission agrees that it will not institute new proceedings of any kind under Section 223(b) for any alleged violations by Audio Enterprises or Wendy King arising out of conduct on which the Notice of Apparent Liability Proceeding was based or for conduct associated with services identified in paragraph 6 occurring prior to the effective date of this Consent Decree. The Commission represents that as of the effective date of this Consent Decree, it has not recommended, and further agrees that it will not recommend, to any other agency of the United States with authority to enforce the civil or criminal penalties set forth in Section 223(b) or Section 223(b) as amended that it take any action against Audio Enterprises or Wendy King for conduct on which the Notice of Apparent Liability Proceeding was based.

10. Audio Enterprises and Wendy King agree that any violation of the Final Order shall constitute a separate violation of a Commission order, entitling the Commission to exercise any rights and remedies attendant to the enforcement of a Commission order.

11. The parties further agree that the effectiveness of this Consent Decree is expressly contingent upon Commission acceptance of the Consent Decree and termination of the Notice of Apparent Liability Proceeding, and shall become effective on the date of the issuance of a Final Order as described herein. If the Consent Decree is not accepted by the Commission, it shall become null and void and shall not become part of the record in the Notice of Apparent Liability Proceeding nor may it be used in any fashion by any party in a legal proceeding. In the event that the Consent Decree is not accepted by the Commission, Audio Enterprises shall respond to the Notice of Apparent Liability within 30 days of the date on which Audio Enterprises or its counsel receives written notification from the Bureau that the Commission's acceptance cannot be obtained. The Bureau agrees to notify counsel by telephone of the Commission's decision on the day it is released.

12. The parties agree that if the Commission brings an action in United States District Court to enforce the terms of the Final Order, Audio Enterprises and Wendy King agree that they will not contest the validity of the Final Order, will waive their statutory right to a trial *de novo* and will consent to a judgment incorporating the terms of this Consent Decree.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock, Chief
Common Carrier Bureau

Audio Enterprises, Inc.
Wendy King

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-545

In the Matter of

Amendment of Section 73.202(b), RM-6458
Table of Allotments,
FM Broadcast Stations.
(Elko, Nevada)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 10, 1988; Released: December 13, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Elko Broadcasting, Inc. (petitioner) requesting the substitution of Channel 229C2 for Channel 228A at Elko, Nevada, and the modification of its license for Station KLKO to specify the higher powered channel. Petitioner states that it will file an application for the new channel, if allotted.

2. Channel 229C2 can be allotted to Elko in compliance with the Commission's minimum distance separation requirements and can be used at Station KLKO's present transmitter site.[1] As requested, we shall also propose to modify petitioner's license for Station KLKO to specify operation on Channel 229C2 in lieu of its present Class A channel. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in use of Channel 229C2 at Elko or require the petitioner to demonstrate the availability of an additional equivalent channel for use by such interested parties.

3. We believe the public interest would be served by proposing the substitution of Channel 229C2 for Channel 228A at Elko, Nevada, since it could enable Station KLKO to expand its coverage area. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Elko, Nevada	228A, 237A	229C2, 237A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 2, 1989,** and reply comments on or before **February 17, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

D. Ray Gardner, President
Radio Station KLKO
Elko Broadcasting Company
1800 Idaho Street
Elko, Nevada 89801
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments. Section 73.202(b) of the Commission's Rules and Regulations. as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 40-50-37 and West Longitude 115-44-58.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-544

In the Matter of

Amendment of Section 73.202(b). RM-6487
Table of Allotments,
FM Broadcast Stations.
(Shadyside, Ohio)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 10, 1988; Released: December 13, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Arthur V. Belendiuk d/b/a Shadyside Wireless (petitioner), requesting the substitution of Channel 239B1 for Channel 239A at Shadyside, Ohio, and the modification of its construction permit to specify the higher powered channel. Petitioner failed to affirmatively state its intention to apply for Channel 239B1, if allotted, and is therefore requested to do so in comments.

2. Channel 239B1 can be allotted to Shadyside in compliance with the Commission's minimum distance separation requirements with a site restriction of 7.0 kilometers (4.4 miles) north to accommodate petitioner's desired transmitter site.[1] Canadian concurrence in the allotment is required since Shadyside is located within 320 kilometers (200 miles) of the U.S.-Canadian border. As requested, we will also propose to amend petitioner's construction permit to specify operation on co-Channel 239B1. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of the channel at Shadyside or require the petitioner to demonstrate the availability of an additional equivalent channel for use by such parties.

3. We believe the public interest would be served by proposing the substitution of Channel 239B1 for Channel 239A at Shadyside, Ohio, since it could enable the petitioner to provide expanded service to the community and the surrounding area. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Shadyside, Ohio	239A	239B1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 2, 1989,** and reply comments on or before **February 17, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Arthur V. Belundiuk
Smithwick & Belendiuk, P.C.
2033 M Street, N.W., Suite 207
Washington, D.C. 20036
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 40-02-00 and West Longitude 80-45-45.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-543

In the Matter of

Amendment of Section 73.202(b), RM-6457
Table of Allotments,
FM Broadcast Stations.
(Essex, New York)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 10, 1988; Released: December 13, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Russell P. Kinsley (petitioner), requesting the allotment of Channel 267A to Essex, New York, as the community's first local FM allotment. Petitioner states that he will apply for the channel, if allotted.

2. Section 307(b) of the Communications Act of 1934, as amended, mandates that the Commission distribute broadcast channels among the several states and communities. A community for allotment purposes has been defined as an identifiable population grouping. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to satisfy its status. However, absent such recognizable community factors, the petitioner must present the Commission with sufficient information to demonstrate that such a place has social, economic or cultural indicia to qualify it as a community for allotment purposes. *See, e.g., Ansley, Alabama*, 46 Fed. Reg. 58688, published December 3, 1983, and *Ellwood, California*, 50 Fed. Reg. 13031, published April 2, 1985. However, Essex is not listed in the 1980 U.S. Census and petitioner does not state that it is incorporated. Therefore, petitioner is requested to submit additional information regarding Essex to demonstrate whether it has any businesses, social and civic organizations and governmental units that identify themselves therewith.

3. We believe the public interest would be served by proposing the allotment of Channel 267A to Essex, since it could provide the place with its first local FM service, if petitioner can demonstrate that Essex is a community for allotment purposes. Channel 267A can be allotted to Essex in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] Canadian concurrence in the allotment is required since Essex is located within 320 kilometers (200 miles) of the U.S.- Canadian border. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Essex, New York	–	267A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 2, 1989,** and reply comments on or before **February 17, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Russell P. Kinsley
P.O. Box 301
Winooski, Vermont 05404
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division

Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 44-18-30 and West Longitude 73-21-24.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-542

In the Matter of

Amendment of Section 73.202(b), RM-6462
Table of Allotments,
FM Broadcast Stations.
(Lebanon, Oregon)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 10, 1988; Released: December 13, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Spotlight Media Corporation (petitioner), requesting the substitution of Channel 279C for Channel 279C1 at Lebanon, Oregon, and the modification of its license for Station KIQY to specify the higher powered channel. Petitioner states that the increase in its facilities could allow it to expand its coverage and remedy signal problems in those portions of Willamette Valley which it now serves, thus allowing it to more effectively compete in the market.

2. We believe the public interest would be served by proposing the substitution of Channel 279C for Channel 279C1 at Lebanon, Oregon, since it could permit Station KIQY to expand its coverage area. Channel 279C can be allotted to Lebanon in compliance with the Commission's minimum distance separation requirements with a site restriction of 5.5 kilometers (3.4 miles) southwest to accommodate petitioner's desired transmitter site.[1] As requested, we shall also propose to modify the license of Station KIQY to specify operation on Channel 279C. In accordance with Section 1.420(g) of the Commission's Rules, the station's license may be modified without accepting competing expressions of interest in use of the channel at Lebanon and without requiring the petitioner to demonstrate the availability of an additional equivalent channel for use by such interested parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Lebanon, Oregon	279C1	279C

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 2, 1989,** and reply comments on or before **February 17, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Barry D. Wood, Esq.
Ronald D. Maines, Esq.
Jones, Waldo, Holbrook & McDonough, P.C.
1001-22nd Street, N.W., Suite 350
Washington, D.C. 20037
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 44-30-17 and West Longitude 122-57-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 88-550

In the Matter of

Amendment of Parts 2 and 80 of the Commission's Rules to Accommodate Next Generation Weather Radars in the 2900-3000 MHz Band

NOTICE OF PROPOSED RULE MAKING

Adopted: November 29, 1988; Released: December 14, 1988

By the Commission:

INTRODUCTION

1. By this action the Commission is proposing to amend the Table of Frequency Allocations in Section 2.106 of the Rules, 47 CFR 2.106, by adding a footnote to permit operation of Federal Government Next Generation Weather Radar (NEXRAD) systems in the 2900-3000 MHz band. Also, Part 80 is proposed to be amended to recognize the need to avoid causing interference to these systems.

BACKGROUND

2. On November 9, 1987, the National Telecommunications and Information Administration (NTIA) submitted a letter to the Commission requesting an amendment to the Table of Frequency Allocations to accommodate Federal Government Next Generation Weather Radar (NEXRAD) systems. These new radars are a joint development of the Department of Commerce, the Federal Aviation Administration (FAA) and the Air Force. NEXRADs will replace existing, outdated weather radars currently operating in the meteorological aids service in the 2700-2900 MHz band.[1] These new radar systems will provide improved weather data collection to monitor and predict adverse weather conditions.

3. NTIA states that the new radars will generally replace the existing 2700-2900 MHz weather radars on a one-for-one basis. NTIA found that in some geographic areas insufficient frequencies will be available in the 2700-2900 MHz band to accommodate all of the planned NEXRAD systems. NTIA identified the 2900-3000 MHz band as a potential resource to accommodate NEXRAD installations that cannot be assigned spectrum in the 2700-2900 MHz radio band. The 2900-3000 MHz band is currently allocated for maritime radio navigation on a primary basis and radiolocation on a secondary basis for both Government and non-Government use. NTIA advises that interference between NEXRADS and existing services in the 2900-3000 MHz band can be avoided through frequency coordination. Accordingly, NTIA requests that the Commission amend the Table of Frequency Allocations by adopting the following footnote for the 2900-3000 MHz band:

US309

The band 2900-3000 MHz is also allocated on a primary basis to the Meteorological Aids Service. Operations in this service are limited to Government Next Generation Weather Radar (NEXRAD) systems where accommodation in the 2700-2900 MHz band is not technically practical and are subject to coordination with existing authorized stations.

4. NTIA indicates that no more than about twenty-one NEXRAD installations will require use of frequencies in the 2900-3000 MHz band. Analyses were performed for 127 of the 154 projected NEXRAD operational sites in the continental U.S. Of these 127 sites, only two sites cannot be currently accommodated in the existing 2700-2900 MHz band. Only certain of the remaining 27 sites have any likelihood of requiring frequencies outside the 2700-2900 MHz band. NTIA advises that an additional 17 NEXRADs will be used on an interim basis at certain airports pending implementation of radar systems in other frequency bands. Certain of these may require frequencies in the 2900-3000 MHz band.

DISCUSSION

5. We have reviewed NTIA's request and tentatively conclude that the requested allocation is in the public interest. Improved weather prediction is beneficial to the public in many ways. Perhaps of greatest significance here is that NEXRAD systems will provide better weather information in connection with air travel. Weather conditions often have been a contributing factor in air accidents. Thus, NEXRAD systems will serve the public interest by helping to ensure safer air travel. Moreover, our national defense forces will benefit from the improved weather information that will be provided by NEXRAD systems. Accordingly, we believe that NEXRAD systems merit spectrum support. We accept NTIA's assertion that every attempt has been and will continue to be made to accommodate NEXRAD systems in the Government 2700-2900 MHz band. We also note that only a very limited number of NEXRAD installations will require access to the 2900-3000 MHz band.

6. The U.S. Coast Guard operates maritime radionavigation stations which include numerous radiobeacon (racon) stations in the 2900-3100 MHz band as part of the national maritime safety system. In addition our records indicate there are about 49 non-Government maritime radionavigation stations assigned in the 2900-3100 MHz band on a primary basis.[2] Also, this band is used as one of the primary ship radar bands for radionavigation purposes on a world-wide basis. In addition, numerous ships operate radionavigation radars and shipboard transponders to interrogate radiobeacons. NTIA indicates that the likelihood of interference between NEXRADs and existing systems can be minimized with proper site selection due to the characteristics of NEXRAD systems. Specifically NEXRADs will use a one-degree pencil beam and a unique scanning sequence where the beam is pointed well above the horizon much of the time. [3] The Coast Guard concurs

to the accomodation of NEXRADs based upon the understanding that coast and ship radionavigation stations will continue to be afforded protection against interference by coordination of NEXRAD site locations and operating characteristics. This could be accomplished, for example, by ensuring that the NEXRAD antenna beam, including sidelobes, is directed away from any nearby shipping lanes or racon sites.

7. We believe that any potential interference problems can be resolved through the routine frequency coordination process of the Frequency Assignment Subcommittee (FAS) of the Interdepartment Radio Advisory Committee. This process requires the concerned parties to analyze potential interference to and from other systems. The information is reviewed by the Commission's representative and the representatives of other Federal agencies as appropriate, including the Coast Guard. The FAS frequency coordination process is used routinely to coordinate government and non-government operations in numerous shared frequency bands. Thus, we have confidence that review of NEXRAD planned installations by the FCC representative, by the Coast Guard and by other Government agencies, will adequately safeguard against potential interference to non-Government licensees.

8. In light of the benefits of NEXRAD systems, the small number of such systems that may use the 2900-3000 MHz band, the improbability of interference to existing non-Government licensees, and the review afforded by the FAS frequency coordination process, we find the frequency allocation requested by NTIA is in the public interest. Accordingly, we are proposing to amend the Table of Frequency Allocations by adding the footnote requested by NTIA.[4]

INITIAL REGULATORY FLEXIBILITY ANALYSIS

9. A regulatory flexibility analysis is not required in this case. NEXRADs operating in the 2900-3000 MHz will not have a significant impact on small entities. Therefore, we certify that Section 605(b) of the Regulatory Flexibility Act of 1980 (Pub. L. 96-354) does not apply to this proceeding.

10. This proposal will allow NEXRADs to operate in the 2900-3000 MHz band on a co-primary basis when it is not feasible to do so in the 2700-2900 MHz band. No other significant alternatives have been identified.

11. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours on the public.

12. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that a matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

13. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if ora[1] is made without advanced notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summerizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

14. This action is taken pursuant to Sections 4(i), 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 303(c), 303(f), 303(g), and 303(r). Interested parties may file comments on this proposal on or before **February 3, 1989**, and reply comments on or before **February 21, 1989.** All relevant and timely comments filed in accordance with Sections 1.415 and 1.419 of our rules and regulations (47 C.F.R. Sections 1.415 and 1.419) will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration ideas not contained in the comments, provided that such information is placed in the public file, and provided that the Commission's reliance on such information is noted in ite final decision.

15. In accordance with the provisions of Section 1.419 of the Rules and Regulations, 47 C.F.R. Section 1.419, formal participants shall file an original and five copies of their comments and other material. Participants wishing each Commissioner to have a personal copy of their comments should file an original and nine copies. Members of the general public may express their comments without regard to form (as long as the docket number is clearly stated in the heading). All documents will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters in Washington, D.C.

16. For further information concerning this rule making contact Mr. Damon C. Ladson at (202) 653-8106, Office of Engineering and Technology, Federal Communications Commission, Washington, D.C. 20554.

PROPOSED RULE CHANGES

Parts 2 & 80 of Chapter I of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

A. PART 2 - FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

1. The authority citation in Part 2 continues to read:

AUTHORITY: Sec. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted.

2. Section 2.106, the Table of Frequency Allocations, is amended by listing footnote US309 in column 5 for the 2900-3100 MHz band and by adding the text of footnote US309 to the list of footnotes at the end of the table as follows:

Section 2.106 Table of Frequency Allocations

United States table

Government Allocation (MHz) (4)	Non-Government Allocation (MHz) (5)
* * *	* * *
2900-3100	2900-3100
MARITIME RADIONAVIGATION	MARITIME RADIONAVIGATION
772 774 775	772 774 775
METEOROLOGICAL AIDS	Radiolocation
US309	US44 US309
Radiolocation	
US44	
* * *	* * *

* * * * *

United States (US) Footnotes

* * * * *

US309

The band 2900-3000 MHz is also allocated on a primary basis to the Meteorological Aids Service. Operations in this service are limited to Government Next Generation Weather Radar (NEXRAD) systems where accomodation in the 2700-2900 MHz band is not technically practical and are subject to coordination with existing authorized stations.

B. PART 80 - STATIONS IN THE MARITIME SERVICES

1. The authority citation in Part 80 continues to read:

AUTHORITY: Sec. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 302, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377, unless otherwise noted.

2. In Section 80.375 paragraph (d) (2)(ii) is revised to read as follows:

Section 80.375 Radiodetermination Frequencies

* * * * *

(d) Radiodetermination frequency bands above 2400 MHz.

(2) * * *

(ii) The use of the 2900-3100 MHz, 5470-5650 MHz and 9300-9500 MHz bands for radiolocation must not cause harmful interference to the radionavigation, Government radiolocation services. Additionally, the use of the 2900-3000 MHz band for radiolocation must not cause harmful interference to the Government meteorological aids service.

* * * * *

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Nexrad will replace the following weather radar systems: NWS WSR-57, NWS WSR-74S and DOD AN/FPS-77. In addition, the FAA proposes NEXRAD operation at 17 terminal sites, as an interim measure, prior to operating the Terminal Doppler Weather Radar at 5600-5650 MHz.

[2] There are also 13 secondary radiolocation stations operating in this band. In addition, our database shows one radiolocation test station and one aviation radiolocation station.

[3] NTIA indicates that the likelihood of interference between existing systems and NEXRADs is minimal due to the characteristics of NEXRAD systems. According to NTIA, it is conceivable that NEXRAD systems could cause certain radio beacons (racons) to transmit more often. These racons are buoy mounted, powered by batteries and transmit only upon interrogation from a ship. The concern is that NEXRADs operating on the same frequency will increase the number of racon inter-

rogations and thereby increase racon battery drain. However, NTIA concluded that the impact on battery drain due to potential interrogations from NEXRAD systems would be negligible.

[4] NTIA has already amended the Government Table of Frequency Allocations by adding the footnote discussed herein. This proposal deals only with the non-Government Table.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-538

In re Applications of

SARASOTA-CHARLOTTE BROADCASTING CORPORATION (hereafter SCBC) — File No. BPH-870908MX

WILLIAM A. JAMES (hereafter James) — File No. BPH-870909ML

SOUTH FLORIDA BROADCAST LIMITED PARTNERSHIP (hereafter South) — File No.BPH-870910MK

CAWLEY BROADCASTING CORPORATION, INC. (hereafter Cawley) — File No. BPH-870910MM

RUSSELL EARL WARREN, JR. (hereafter Warren) — File No. BPH-870910MN

CHARLES L. FERNANDEZ AND TONY W. FERNANDEZ (hereafter Fernandez) — File No. BPH-870910MR

CONSTANCE WHITAKER AND WARREN KOERBEL GENERAL PARTNERS, D/B/A SEAFOAM BROADCASTERS, LTD. (hereafter Seafoam) — File No. BPH-870910MW

A. P. WALTER, JR. (hereafter Walter) — File No. BPH-870910MY

ENGLEWOOD RADIO, INC. (hereafter ERI) — File No. BPH-870910NS

SANDPIPER BROADCASTING INC. (hereafter Sandpiper) — File No. BPH-870910OG

HARBOR SOUNDS, INC. (hereafter Harbor Sounds) — File No. BPH-870910MA (DISMISSED HEREIN)

ENGLEWOOD BROADCASTING ASSOCIATES (hereafter EBA) — File No. BPH-870910NG (DISMISSED HEREIN)

NEW SOUTH COMMUNICATIONS, INC. (hereafter New South) — File No. BPH-870910OA (DISMISSED HEREIN)

For Construction Permit
for a New FM Station on
Channel 290A in Englewood, Florida.

HEARING DESIGNATION ORDER

Adopted: November 17, 1988; Released: December 15, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *Preliminary Matters.* On June 13, 1988, SCBC petitioned for leave to amend its application. The petition was accompanied by an amendment specifying a new transmitter site. The accompanying amendment was filed after the last date for filing minor amendments as of right. In support of its request for acceptance of the late-filed amendment, SCBC stated that it had been advised by the Federal Aviation Administration (FAA) that a "Determination of No Air Hazard" clearance could not be issued for its proposed transmitter site. SCBC has made the requisite good cause showing, pursuant to 47 C.F.R. § 73.3522(a)(2), for acceptance of its late-filed amendment. Consequently, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

3. SCBC has disclosed that it is the licensee of Station WENG(AM), a daytime only station in Englewood, Florida. SCBC has indicated that it will divest itself of WENG(AM), in accordance with the Commission's *Second Report and Order* in Docket 84-231, 101 FCC 2d 638, 646 (1985), in the event of grant of its application for new FM service in Englewood, Florida. Accordingly, an appropriate divestiture condition will be specified.

4. South has disclosed that its general partner, Judith Ann French, is an employee of Station WEEJ(FM), Port Charlotte, Florida. South has indicated that Ms. French will terminate her employment at WEEJ(FM) upon grant of its application for new FM service to Englewood, Florida. Accordingly, an appropriate divestiture condition will be specified.

5. Fernandez has disclosed that its general partner Charles L. Fernandez is General Manager of Station WKXY(AM), Sarasota, Florida, and that its general partner Tony W. Fernandez is Engineer at WKXY(AM). Fernandez has indicated that its principals intend to terminate their employment with WKXY(AM) upon grant of its application for new FM service in Englewood, Florida. Accordingly, an appropriate divestiture condition will be specified.

6. Seafoam and Sandpiper request waiver of the minimum distance separation requirements set out at 47 C.F.R. § 73.207 with respect to the proposed allotment of

Channel 291A to Fort Myers Villas, Florida. A petition for rule making seeking to substitute Channel 291A for Channel 292A at Fort Myers Villas, Florida was pending before the Commission at the time that Seafoam and Sandpiper filed their applications for the instant allocation. However, the Commission's *Notice of Proposed Rule Making* in response to the requested channel substitution imposed a site restriction on the proposal for Channel 291A at Fort Myers Villas pursuant to 47 C.F.R. § 73.207 in order to avoid short spacing between the proposal for Fort Myers Villas and the pending applications for the instant allocation at Englewood, Florida. *See* 3 FCC Rcd 1083 (1988). The waiver requests of both Seafoam and Sandpiper acknowledge that the imposition of such a site restriction on the proposal for Channel 291A at Fort Myers Villas would obviate the need for waiver of the minimum distance separation requirements pursuant to 47 C.F.R. § 73.207 with respect to their proposals. Moreover, engineering study of the proposals of Seafoam and Sandpiper reveals in each case that the proposals are in compliance with 47 C.F.R. § 73.207 with respect to the proposal set out in the *Notice of Proposed Rule Making, supra*. Accordingly, the waiver requests of Seafoam and Sandpiper will be dismissed as moot.

7. *Other matters*. In response to Section VI, FCC Form 301, the applicants below have indicated that they will employ five or more full-time employees. Pursuant to 47 C.F.R. § 73.2080(c), each applicant is required to submit an Equal Employment Opportunity (EEO) Program in compliance with the provisions of the rules as set forth in FCC Form 396(A), the 5-Point Model EEO Program. The EEO Programs submitted by the listed applicants are incomplete or otherwise deficient in the manner described. Accordingly, the listed applicants will be required to file amended EEO Programs with the presiding Administrative Law Judge within 30 days of the release of this Order.

APPLICANT	DEFICIENCY
SCBC	Failed to identify specific publications which will be used to attract women and minority candidates.
	Failed to identify specific sources of recruitment specializing in minority candidates.
Walter	Failed to identify specific publications which will be used to attract women and minority candidates.

8. Seafoam petitioned for leave to amend its application on March 7, 1988. The accompanying amendment was filed after December 3, 1987, the last date for filing minor amendments as of right. Under 47 C.F.R. § 1.65 the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

9. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the following applicants have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by James, South, Cawley, Warren, Fernandez, Seafoam, Walter, ERI, and Sandpiper would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

10. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the residence address of each of its principals. SCBC has not completed Item 4 correctly. SCBC's application gives a post office box as the residence addresses for its principals Clyde Lasbury, Leah Lasbury and Leah B. Lasbury. Cawley has also failed to complete Item 4 correctly. Cawley fails to specify a number and street in the address listed for it and its principal Augustine M. Cawley. Accordingly, SCBC and Cawley will be required to submit amendments which give all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

11. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

12. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

13. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicants would constitute a hazard to air navigation: James, South, Cawley, Warren, Fernandez, Seafoam, Walter, ERI, Sandpiper.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

14. II IS FURTHER ORDERED That, for the reasons set forth in footnote 1 hereinabove, the applications of Harbor Sounds, EBA and New South ARE HEREBY DISMISSED.

15. IT IS FURTHER ORDERED That, for the reasons set forth in paragraph 2 hereinabove, SCBC's petition for leave to amend its application filed June 13, 1988 IS GRANTED and the corresponding amendment IS ACCEPTED to the extent indicated herein.

16. IT IS FURTHER ORDERED, That in the event of grant of SCBC's application, the construction permit shall be conditioned as follows:

Prior to the commencement of operation of the station authorized herein pursuant to program test authority, the permittee shall certify to the Commission that it has divested itself of all interests in and severed all connections with Station WENG(AM), Englewood, Florida.

17. IT IS FURTHER ORDERED, That in the event of grant of South's application, the construction permit shall be conditioned as follows:

Prior to the commencement of operation of the station authorized herein pursuant to program test authority, the permittee shall certify to the Commission that its principal, Judith Ann French, has terminated her employment and severed all connections with Station WEEJ(FM), Port Charlotte, Florida.

18. IT IS FURTHER ORDERED, That in the event of grant of the Fernandez application, the construction permit shall be conditioned as follows:

Prior to the commencement of operation of the station authorized herein pursuant to program test authority, the permittee shall certify to the Commission that its principals Charles L. Fernandez and Tony W. Fernandez have terminated their employment and severed all connections with Station WKXY(AM), Sarasota, Florida.

19. IT IS FURTHER ORDERED, That for the reasons stated in paragraph 6 hereinabove, the requests of Seafoam and Sandpiper for waiver of 47 C.F.R. § 73.207 ARE HEREBY DISMISSED as moot.

20. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, SCBC and Walter shall submit Section VI information in accordance with the requirement of 47 C.F.R. § 73.2080(c) to the presiding Administrative Law Judge.

21. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Seafoam IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

22. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

23. IT IS FURTHER ORDERED, That SCBC and Cawley shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

24. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

25. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

26. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner prescribed therein and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] By letter dated June 8, 1988, Harbor Sounds filed a Request for Voluntary Dismissal of its application. EBA requested dismissal of its application by letter dated March 10, 1988. By letter dated April 29, 1988, New South filed a Notice of Dismissal of Application. Each applicant has provided an affidavit of no consideration in compliance with 47 C.F.R. § 73.3525. Accordingly, these applications will be dismissed.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NEVADA BELL'S

Permanent Cost Allocation Manual
for the Separation of Regulated
and Nonregulated Costs

and AAD 7-1692

PACIFIC BELL'S

Permanent Cost Allocation Manual
for the Separation of Regulated
and Nonregulated Costs

MEMORANDUM OPINION AND ORDER

Adopted: November 30, 1988; Released: December 12, 1988

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In the *Joint Cost Order*,[1] the Commission required certain subject carriers, including Nevada Bell (Nevada) and Pacific Bell (Pacific), to file manuals for separating the costs of regulated telecommunications services from the costs of nonregulated activities. In response to this requirement, Nevada and Pacific filed cost allocation manuals on September 1, 1987. Those manuals described Nevada's and Pacific's nonregulated activities, listed the activities Nevada and Pacific proposed to treat as incidental activities, and provided information on Nevada's and Pacific's affiliate transactions, employee time reporting procedures, and cost apportionment methods.

2. We reviewed those manuals in the *Nevada and Pacific Order* [2] and found that certain areas of the manuals required clarification or revision. Despite these problem areas, we conditionally approved Nevada's and Pacific's manuals. We determined that the manuals provided adequate assurances against the misallocation of costs and revenues between regulated and nonregulated activities to permit their implementation on January 1, 1988. We required, however, that Nevada and Pacific submit revisions addressing each of the specified problem areas. We stated that these revisions would be subject to public comment and our review, and that we would take all appropriate action, including the prescription of specific apportionment procedures, in the event we disapproved any part of the revised manuals. [3]

3. Nevada and Pacific submitted their revisions on March 21, 1988, and further revised their manuals on June 30, 1988, and on September 30, 1988. The March 21 revisions provide additional information regarding the problem areas identified in the *Nevada and Pacific Order* and, according to Nevada and Pacific, are responsive to that Order.[4] MCI Telecommunications Corporation (MCI) filed comments on the March 21 revisions, and Nevada and Pacific have replied. The June 30 revisions propose changes in Nevada's and Pacific's cost pool assignment and apportionment methods, and add joint marketing of customer premises equipment to Pacific's list of nonregulated activities. The September 30 revisions propose new cost pools to reflect the detariffing of Customer Dialed Account Recording,[5] and further refine Nevada's and Pacific's apportionment methods. No party commented on the June 30 or September 30 revisions.

4. After reviewing the pleadings and the contents of Nevada's and Pacific's revisions, we find, subject to certain exceptions, that they are consistent with the Commission's requirements for cost allocation and properly implement the *Nevada and Pacific Order*. Before turning to the exceptions, we wish to emphasize that this Order does not discuss the many areas in which Nevada and Pacific have complied fully with Commission requirements and with the *Nevada and Pacific Order*. We also wish to emphasize that the exceptions are very limited in relation to the manuals as a whole. Accordingly, we approve Nevada's and Pacific's revisions, including the June 30 and September 30, 1988 revisions, subject to the filing of additional information and revisions specified herein. The filings shall be made no later than January 31, 1989.[6]

5. In the *Nevada and Pacific Order*, we stated that Nevada and Pacific would be required to make all revisions we approved or ordered effective as of January 1, 1988.[7] We recognize that such retroactivity may not be reasonably practicable with regard to certain additional changes we require in this Order. We direct Nevada and Pacific to make such changes effective January 1, 1988 to the extent possible, and to identify in the transmittal to their respective filings which changes, if any, they cannot reasonably implement as of January 1, 1988, and the justification for not implementing those changes retroactively.[8]

II. DISCUSSION

A. Overall Sufficiency of the Revisions

6. Under the *Joint Cost Order*, cost allocation manuals must describe the nonregulated activities, incidental activities, affiliate transactions, employee time reporting procedures, and cost apportionment methods of the telephone operating companies that will apply them. In the *Nevada and Pacific Order*, we required Nevada and Pacific to provide additional, and in certain instances corrected, information regarding most of these areas. We were particularly concerned with the methods Nevada and Pacific proposed for assigning costs to cost pools and for apportioning cost pools between regulated and nonregulated activities. We found those methods important because the costing system established in the *Joint Cost Order* requires telephone companies to divide the accounts and subaccounts listed in the Commission's Uniform System of Accounts (USOA) into homogeneous cost categories or pools that can be directly assigned to, directly or indirectly attributed to, or allocated between regulated and nonregulated activities on a cost causative basis.[9]

7. Although we ordered Nevada and Pacific to provide additional information regarding their cost pool assignment and apportionment methods, we did not require

Nevada and Pacific to identify and justify the reporting codes, accounting records, and records of charges to accounts that support those methods. We determined, despite MCI's argument to the contrary, that such information would not be necessary for us to evaluate Nevada's and Pacific's overall apportionment systems.[10]

8. In their revisions, Nevada and Pacific provide extensive additional information regarding their cost pool assignment and apportionment methods. MCI argues that although the information makes the manuals more "cosmetically helpful," many of Nevada's and Pacific's cost pool assignment and apportionment methods remain vague.[11] MCI argues that we must require Nevada and Pacific to provide more thorough descriptions of their cost pool assignment and apportionment methods in order to evaluate the manuals properly and that we should require that information at this time. MCI claims that Nevada's and Pacific's entire costing processes continue to rely on the review and analyses of fundamental accounting records and reporting codes that the manuals neither fully explain nor justify. MCI contends that Nevada and Pacific should be required to describe these records and codes more precisely, and to justify using them as the basis for apportioning costs between regulated and nonregulated activities.[12]

9. MCI argues further that we should clarify the procedures we intend to employ in auditing and overseeing the cost allocation manual process. In MCI's view, these procedures should make clear that telephone companies must make their fundamental cost data available to their independent auditors and to the Commission, and should specify how the Commission intends to review and test that data. In addition, MCI maintains that we should state the processes we will employ to review independent auditor reports and to obtain any relevant cost data that the independent auditors do not review.[13]

10. In reply, Nevada and Pacific contend that they have responded to each specific point raised by the Commission in the *Nevada and Pacific Order* and that MCI has failed to identify any specific area in which their manuals are still deficient. Further, they maintain that MCI has misstated the standard for review in the manual approval process with respect to the level of detail that must be evaluated.[14] Nevada and Pacific also claim that MCI's call for additional records, analyses, and data reflects misunderstanding of the underlying reporting structure established by the Commission.[15] Finally, Nevada and Pacific argue that MCI's request for clarification of the Commission's oversight and enforcement policies raises matters which have already been addressed in the *Joint Cost Order* and the *Reconsideration Order* and that are beyond the scope of the present proceeding.[16]

11. We find that Nevada's and Pacific's revised manuals generally comply with the *Nevada and Pacific Order*. In that Order, we declined to require Nevada and Pacific to identify and justify the reporting codes, accounting records, and records of charges to accounts that support their cost pool assignment and apportionment methods. We found that requiring Nevada and Pacific to describe those methods in greater detail would be sufficient to eliminate any ambiguities and deficiencies in the manuals.[17]

12. Our review of the manuals confirms that they now contain sufficient information for us to evaluate virtually all of Nevada's and Pacific's cost pool assignment and apportionment methods. We required additional information regarding those methods for two reasons. First, we wanted to ensure that the Commission, Nevada and Pacific, and the independent auditors would share a common understanding of the manuals. We are satisfied that the revised manuals achieve this purpose. More detailed manuals would not increase our ability or the independent auditors' ability to verify proper implementation of the manuals.[18]

13. Our second reason for requiring additional information regarding Nevada's and Pacific's cost pool assignment and apportionment methods was to enable us to review the substantive merit of those methods that Nevada and Pacific had not adequately explained. In virtually all instances, the revisions provide sufficient information to let us perform this review. As discussed below, we require additional information regarding a limited number of Nevada's and Pacific's cost pool assignment and apportionment methods. However, that information need not include the reporting codes, accounting records, analytical steps, and other procedures that Nevada and Pacific have developed to implement their apportionment methods.[19] Accordingly, we reject MCI's request that we require Nevada and Pacific to provide an additional level of detail regarding their overall cost pool assignment and apportionment methods.

14. We agree with MCI, however, that the data gathering procedures and documentation underlying the apportionment procedures set forth in the manuals are critical in any decision as to the reasonableness of the amounts assigned or allocated to nonregulated activities. However, that does not justify inclusion of such material in the manuals to the extent that the resulting documents are so cumbersome as to obscure their primary purpose -- the comprehensive description of how the carrier complies with the Commission's cost apportionment policies and rules.[20] It may well be that our audits or our review of the independent auditor reports will reveal problems not with the apportionment procedures themselves, but with the underlying data collection and recording procedures. If this is the case, we will require revisions in the apportionment results and, if necessary, disallow for ratemaking purposes those costs that have been improperly included in the carriers' regulated accounts.

15. We also decline to specify the precise procedures we will employ in auditing and overseeing the cost allocation manual implementation process. While we intend to examine cost allocation and other accounting procedures in the course of our regular carrier audits and our review of independent auditor reports,[21] the procedures we will employ will be tailored to the circumstances we encounter. We emphasize, however, that telephone companies must retain a complete audit trail of all cost allocations and affiliate transactions, and must make that information as well as the independent audit and all related data and workpapers available to the Commission.[22] We will, of course, require further changes to the manuals in the event our own audits or our review of the independent auditor reports reveal a need for such action.[23]

B. Affiliate Transactions

16. *Introduction*. The affiliate transactions section of Pacific's initial manual consisted of a brief description of the services and assets which Pacific provides to its nonregulated affiliates. This section of the manual did not, however, make any reference to services or assets which Pacific's nonregulated affiliates might provide to it.[24] In

the *Nevada and Pacific Order*, we directed Pacific to expand and clarify this section and to include those transactions, if any, in which it receives assets or services from its affiliates.[25] In its March 21, 1988 revisions, Pacific submitted an almost completely new affiliate transactions section.[26] These revisions generally comply with our requirements, but they also disclose a number of new specific defects which Pacific must correct.

17. *Confusing and Imprecise Terminology*. There are three instances in the revised affiliate transactions section in which Pacific's terminology is deficient. First, in a general discussion of the services which Pacific provides to its affiliates, the manual states that when price lists or tariffed rates are unavailable, "primary costs are directly assigned, and all other costs are allocated and attributed in accordance with the Cost Apportionment Table."[27] We are uncertain what Pacific means by "primary costs." That term clearly is not a term of art drawn from the *Joint Cost Order*, in which the Commission stated that "[c]osts shall be directly assigned to either regulated or nonregulated activities whenever possible."[28] Accordingly, we direct that the term be replaced with language that conforms strictly to the carefully framed wording of that Order.

18. The second instance of confusing terminology occurs in Pacific's description of how the costs of general corporate support incurred by Pacific Telesis Group (Pacific Telesis), the overall corporate parent, are apportioned among its regulated and nonregulated subsidiaries. This passage begins by stating that "costs which cannot be attributed to any subsidiary are not assigned or allocated." Then, after explanations of direct assignment and direct and indirect attribution, the passage states that "all other costs which cannot be directly assigned or indirectly allocated are allocated using a general allocator."[29] This apparent contradiction may arise because Pacific Telesis engages in activities, such as new ventures research and property acquisition, whose costs should not be apportioned to any of its subsidiaries.[30] We direct Pacific to reconcile these statements consistent with our cost allocation rules.

19. The final case of confusing terminology arises in Pacific's description of services which Pacific Bell Directory performs for Pacific. The revised manual refers to an activity called "Classified Closing Costs" in which Pacific Bell Directory "provides white page closing costs for local directories . . . ."[31] Since the phrase "classified directory" usually refers to the yellow pages, we require that Pacific clarify this matter.

20. *Real Estate Services*. There are two problems in Pacific's revised affiliate transactions section involving real estate services. The first arises from a statement in the manual that Pacific provides property management services to its nonregulated affiliates at prices "charged in accordance with a market rate determined by nonaffiliated, third party brokers."[32] In addition to being vague, this methodology is contrary to our cost allocation rules. The *Joint Cost Order* and the regulations which it established require that services which a carrier provides to a nonregulated affiliate, for which there are no tariffed rates, be recorded at fully allocated cost. The only general exception to this rule is to allow the use of prevailing company prices determined by reference to the prices charged for the services when they are actually provided by the carrier to nonaffiliated entities.[33]

21. In the *Reconsideration Order*, the Commission expressly rejected proposals for a second exception which would have allowed such costs to be determined by reference to the "prevailing prices" that nonaffiliated firms charge other nonaffiliated entities in the marketplace. The Commission denied this alternative because of the difficulty in monitoring prices of this kind and because of the potential for abuse.[34] Without this second exception to the fully allocated cost rule, then, the cost of Pacific's property management services cannot be based on prices set by third-party brokers. Since Pacific otherwise has made no showing under the first exception that it provides these services to any nonaffiliated entities, it must amend this part of its manual to measure the cost of these real estate management services on a fully allocated cost basis.

22. The second problem Pacific's revisions raise in relation to real estate services concerns PacTel Properties (PTP), a nonregulated affiliate created to engage in real estate transactions on behalf of all Pacific Telesis subsidiaries. The principles regarding the fully allocated cost rule and its exception which we discussed above also apply to Pacific's relationship with PTP, though in a reversed way because here Pacific is receiving the services rather than providing them. The revised manual states that PTP leases office space to Pacific in a single building and that "the cost was negotiated at market rate by the nonaffiliated prior owner of the building and extends through August 31, 1996."[35] There is no showing that PTP leases office space to a sufficiently large number of nonaffiliated entities, and there is no other exception to the rule. Accordingly, Facific must amend this part of its manual to record the lease on a fully allocated cost basis.

23. *Nevada's Terminology*. The affiliate transactions section of Nevada's manual is in much the same posture as Pacific's: the initial version was unduly vague and brief;[36] we directed clarification and amplification of it in the *Nevada and Pacific Order*;[37] and the current revised version is generally satisfactory except for some specific problems with confusing terminology.[38] The first such deficiency is identical with the one discussed previously concerning Pacific's share of the costs of general corporate support provided by Pacific Telesis.[39] Nevada shall also use language that conforms strictly to the *Joint Cost Order* to describe how these costs are calculated.

24. The other defect concerns the description of Nevada's arrangements with Pacific Bell Directory for publishing the white pages and yellow pages.[40] In substance, the relationship of Nevada with Pacific Bell Directory appears to be similar to that of Pacific. Unlike Pacific, however, Nevada describes this relationship in its manual in terms of Pacific Telesis' internal "Inter-Entity Transfer Pricing Guidelines" rather than in terms consistent with the *Joint Cost Order*.[41] For example, Nevada states that expenses directly related to production of its directory are "100% billable," whereas Pacific uses terms such as "directly assigned."[42] Since the purpose of the manual is to implement the Commission's cost allocation rules, we direct Nevada to restate this part of its manual using the appropriate terminology.

C. Incidental Activities

25. Pacific's incidental activities section of its initial manual consisted of a list of extremely brief descriptions of each of the services it considers to be incidental, followed by a conclusory, blanket declaration that all of

them satisfy the Commission's criteria for such treatment.[43] In the *Nevada and Pacific Order*, we required Pacific to supplement this section with a specific justification for the incidental status of each individual service.[44] In its revised manual, Pacific has included a substantially expanded account of its incidental services.[45] In general, the revisions satisfy our requirements, but they have raised three new specific problems, as follows.

26. *Sale or Lease of Intellectual Property Rights.* Pacific's revisions state that it sometimes develops products or services in the course of its regulated activities that have protectable intellectual property rights. Pacific states that because it does not design or manufacture telecommunications products or customer premises equipment, it occasionally licenses these rights to third parties for a nontariffed fee.[46] We have no objection to treating this practice as an incidental activity so long as it satisfies the four criteria set forth in the *Joint Cost Order*. We are concerned, however, that Pacific may intend to classify products and services that it develops in the course of its nonregulated activities as outgrowths of regulated activities and to treat the costs of those products and services as well as the revenues from licensing the intellectual property rights relating to those products and services as an incidental activity. Pacific's further revisions must state clearly that it will not do so.

27. *Nevada's Incidental Activities.* The development of Nevada's incidental activities section has been similar to Pacific's. In its initial manual, Nevada presented a bare enumeration of such activities and a conclusory statement that they met the Commission's requirements for incidental status.[47] In the *Nevada and Pacific Order*, we directed Nevada to supplement this section in several respects to demonstrate that these activities satisfied our criteria.[48] Nevada's current revisions are adequate, except for the absence of an explicit statement that its total revenue from these activities is no greater than one percent of its total revenue from all sources.[49] Although we did not specifically mention this important requirement in the *Nevada and Pacific Order*, it obviously must be fulfilled. Accordingly, Nevada must address this matter in its further revisions.

D. Employee Time Reporting

28. In the *Nevada and Pacific Order*, we required Pacific to provide additional information regarding the studies that Pacific had stated it would conduct to measure the time that certain of its employees devote to nonregulated activities.[50] Pacific's revisions indicate that Pacific conducts studies to determine the amount of time its trouble report processing, repair service, and maintenance center employees devote to nonregulated activities. We have several questions regarding these studies.

29. First, in its revisions, Pacific states that it receives trouble reports from customers at its "611 Repair Bureau." Pacific indicates that two studies will enable it to determine the amount of time the employees in that Bureau spend on nonregulated activities. The first study attempts to determine the time that employees in that Bureau spend on functions relating to Pacific's nonregulated inside wiring activities. The second study examines Pacific's store and forward services.[51] Pacific's manual, however, lists additional nonregulated activities, such as protocol processing and the provision of gateway services, that we believe might be the subject of trouble reports from Pacific's customers. Pacific must clarify in its further revisions whether employees in its Repair Bureau spend time on nonregulated activities other than inside wiring and store and forward services and, if so, precisely how that time will be captured and apportioned to nonregulated activities.

30. Second, Pacific's inside wiring and store and forward studies appear to be part of two larger studies that attempt to determine how much time certain personnel spend on those particular nonregulated activities.[52] We are unable to determine precisely which employee groups Pacific intends to examine in these studies, why these studies would not examine the amount of employee time spent on regulated activities, and, to the extent the studies would examine the same employee groups, why Pacific considers separate studies necessary for those groups. Pacific's further revisions must address these matters as part of its full description of each study's methodology.[53]

31. Third, in the discussion of its inside wiring study, Pacific indicates that its repair technicians report their travel and repair time to a nonregulated tracking code when the customer's trouble report identifies an inside wiring problem.[54] We are concerned that this practice might result in the apportionment of travel and repair time to regulated activities for problems that customers state are network problems, but which subsequent diagnosis reveals to have been caused by inside wiring or by one of Pacific's other nonregulated activities. Pacific's further revisions must propose another method for determining when technicians should report travel and repair time to nonregulated tracking codes.

32. Finally, Pacific indicates that when a customer is unable to identify clearly the cause of a problem, all the associated expenses will be apportioned to regulated activities if the problem is later determined to be a network problem; however, Pacific states that only 50% of the expenses will be apportioned to nonregulated activities if the problem is later determined to be an inside wiring problem.[55] We find these procedures totally inadequate. In its further revisions, Pacific shall propose new procedures for apportioning the expenses it incurs in receiving and responding to trouble reports in which the customer is unable to identify the cause of the problem. Pacific shall also state why those procedures would result in an accurate apportionment of the associated costs between regulated and nonregulated activities. In addition, if Pacific believes that it cannot reasonably implement these new procedures as of January 1, 1988, it shall provide in the transmittal to its further revisions sufficient information to enable us to quantify the monetary impact of not implementing the new procedures retroactively.[56]

E. Official Communications Services

33. *Pacific's Services.* Pacific's initial manual included only fragmentary references to official communications services.[57] In the *Nevada and Pacific Order*, we required additional information, particularly with regard to the use of tariffed rates for cost computation, when possible, and to the use of various accounts, such as Account 6728 - Other general and administrative, for apportionment purposes.[58]

34. Pacific's revised manual generally determines the costs of different types of official communications services from their respective tariffed rates and usage.[59] These procedures are adequate. However, the procedures for determining the apportionment of these costs are not adequate. The manual does not sufficiently explain which

cost pools and apportionment factors will be used for official communications costs, except for the costs of facilities leased from interexchange carriers. We direct Pacific to amend its manual to correct these inadequacies.

35. In addition to the general problem with apportionment methodology, there are three specific problems with various aspects of Pacific's official communications service. The first concerns inter-local access transport area (LATA), intrastate toll service. Pacific's revised manual states that this service is furnished through its own private toll network called PBNET, a point-to-point special access network costed at special access tariffed rates.[60] The manual notes that Pacific also obtains interLATA (intrastate and interstate) official service by leasing private lines from interexchange carriers at tariffed rates. However, Pacific fails to make clear whether PBNET involves any switched access or any use of interexchange carrier private lines. In addition, Pacific does not explain adequately whether every component of PBNET does in fact have a tariffed rate and whether fully distributed cost would be used in cases where one does not.

36. A second problem concerns the local area networks (LANs) which Pacific uses in its official communications service. The revised manual states that LAN service is not currently offered to the public under tariff and that the cost of the service for official communications will therefore be calculated through a "pseudo tariff," as if LANs were a public offering.[61] The correct applicable rule in this situation is that, in the absence of a tariffed rate, fully allocated costs must be used. We direct Pacific to use in its manual the language of the Commission's Rules and the *Joint Cost Order* rather than novel terminology of uncertain meaning.

37. The last problem regarding Pacific's revised official communications section is the absence of the internal electronic messaging service which is described in the nonregulated activities section.[62] That service must be included in the official communications section with the same thoroughness we have required for the other services, including explanations of the applicable costing rules, cost pools, and other matters.[63]

38. *Nevada's Services.* The treatment of official communications in Nevada's initial manual was as meager as Pacific's, and we ordered extensive revisions.[64] Nevada's revised treatment is unlike Pacific's, however, in that there has been almost no improvement. Other than a reference to tariffed rates,[65] Nevada offers no explanation of its apportionment methodology for this service. Nevada must state in detail when tariffed rates will be employed, how costs will be apportioned when tariffed rates are not employed, and what accounts, cost pools and allocators will be utilized. Nevada may model its provisions on Pacific's, as modified by our discussion, *supra*, and its own unique circumstances.

F. Enhanced Services

39. *Introduction.* In the *Nevada and Pacific Order*, we required Pacific and Nevada to reformulate their apportionment proposals to eliminate methodologies for determining the costs of hypothetical nonregulated activities, *i.e.*, nonregulated activities that Pacific was unable to describe in any detail, but which might involve some shared use of network plant in the future.[66] In its revisions, Pacific lists four enhanced services -- Customer Dialed Account Recording (CDAR), protocol processing, store and forward services, and gateway services -- among the nonregulated activities that it will be providing during the immediate future. We will discuss each of these services in turn. We believe that a summary of Pacific's overall apportionment methods for enhanced services will provide a perspective for the individual discussions.

40. *Pacific's Enhanced Services.* Pacific intends to use a variety of network plant to deliver its enhanced services. Most of this usage will be provided at tariffed rates. However, these services will also use plant whose costs are recorded in Account 2212 - Digital electronic switching. Pacific proposes to divide that account into "Directly Assigned Regulated," "Directly Assigned Nonregulated," and a series of "Directly Attributable Joint" cost pools each of which would apply to only one of these services. For CDAR, Pacific also proposes a "Directly Attributable Joint" cost pool within Account 2211 - Analog electronic switching.[67]

41. Pacific will incur a variety of expenses in providing these enhanced services. Expenses incurred to support analog electronic switching equipment and digital electronic switching equipment are recorded in Accounts 6211 - Analog electronic expense and 6212 - Digital electronic expense. Pacific's cost pool structures for these accounts parallel the structures it proposes for the corresponding investment accounts.[68] Other expenses that Pacific incurs in connection with these services, for items such as motor vehicles and network administration, are assigned to the "Directly Assigned Nonregulated" or "Directly Attributable Joint" cost pools within the appropriate expense accounts.

42. *CDAR.* This service, which Pacific presently provides, is normally a Centrex feature that permits Pacific's customers to add up to eight digits of their own choosing to the computerized records carriers maintain for station message detail recording calls. These records also include information, such as the date, time, duration, and called number of each outgoing call, that is provided to the customer along with the CDAR digits in his or her monthly bill.[69] However, Pacific states without further explanation that it provides "preset routing access code, restriction of directly dialed AMA [automatic message accounting] charged calls, and recording of CDAR information for inward directed calls" as "CDAR feature options.[70] Pacific must further revise its manual to define each of these "options.[71]

43. As indicated previously,[72] Pacific's revisions introduce "Directly Attributable Joint" cost pools for CDAR within Accounts 2211, 2212, 6211, and 6212. Pacific proposes to apportion these cost pools within Account 2211 and 2212 between regulated and nonregulated activities in proportion to "Peak Forecast Usage-CDAR: [central processing unit] CPU cycles per year.[73] While we have no objection to this apportionment factor at the present,[74] Pacific also proposes that the CDAR cost pools within Accounts 6211 and 6212 be apportioned in the "same proportion as Analog Electronic Switching Investment (Acct. 2211; FRC 77 C)" and the "same proportion as Digital Electronic Switching Investment (Acct. 2212; FRC 377 C), respectively."[75] These apportionment factors are inconsistent with the Commission's requirement that expenses for shared network plant be apportioned on the basis of current relative regulated/nonregulated usage.[76] Since Pacific has not shown why a waiver of that requirement might be appropriate, we must reject these appor-

tionment factors. In its further revisions, Pacific shall propose apportionment factors for these CDAR-related expenses that comply with Commission requirements.[77]

44. *Protocol Processing.* In the *Nevada and Pacific Order*, we directed Pacific to state how it intended to measure usage of the digital electronic switching equipment that would provide nonregulated protocol processing as well as regulated services.[78] In its revisions, Pacific states that it will employ forecast "128 byte 'segments' per year" to measure peak usage and relative "128 byte segments per month" to measure actual usage of this equipment.[79] Although these usage measures seem appropriate, Pacific's revisions disclose two problems that require correction.

45. First, Pacific states that in the early product development stage for its nonregulated protocol processing services, when peak forecasts are not feasible, it will share developmental costs equally between regulated and nonregulated activities.[80] We believe that this proposal may be inconsistent with the Commission's requirement that cost apportionments reflect causality to the maximum practicable extent.[81] We recognize, of course, that during the initial stages of a project Pacific may incur some joint costs that it cannot apportion on a cost causative basis at the time they are incurred. We are concerned, however, that Pacific's apportionment method is entirely arbitrary and that Pacific proposes no mechanism for correcting the results of its arbitrary apportionments once its peak forecasts are completed.

46. Therefore, we require that Pacific create separate "Developmental" cost pools within each account in which it records joint developmental costs that it cannot apportion between regulated and nonregulated activities on a cost causative basis. We will allow Pacific to apportion equal shares of these cost pools to regulated and nonregulated activities on an interim basis. When Pacific makes peak usage forecasts for the relevant project, Pacific shall reapportion in accordance with the forecasts any developmental costs that have been apportioned on this interim basis and shall make out-of-period adjustments to reflect this reapportionment. Pacific shall further revise its manual to specify that it will apply this method to each nonregulated service for which it incurs joint developmental costs that cannot yet be apportioned between regulated and nonregulated activities on a cost causative basis.

47. Second, Pacific states that it does not presently provide nonregulated protocol processing services. Pacific proposes, once it provides those services, to measure current usage by tracking "enhanced 128 byte segments against total basic and enhanced segments.[82] We believe that this usage measurement might understate relative nonregulated usage of the digital electronic switching equipment Pacific uses to provide nonregulated protocol processing services as well as basic services. This would occur if this equipment were to process only a portion of Pacific's basic segments. In its further revisions, Pacific must clarify that this usage measurement will track only the 128 byte segments that are processed by this equipment.

48. Third, for a variety of expense accounts, Pacific proposes to combine all expenses incurred to support protocol processing or store and forward services into a single "Directly Attributable Joint" cost pool within each account. Pacific proposes to apportion these cost pools between regulated and nonregulated activities in proportion to relative regulated and nonregulated usage of its joint digital electronic switching equipment by those two services.[83] Pacific, however, has not stated how it proposes to combine its usage measurement for protocol processing (relative 128 byte segments) and its usage measurement for store and forward services (nonregulated mailboxes relative to total customer accounts) into a single apportionment factor. Apparently Pacific intends to disaggregate these "Directly Attributable Joint" cost pools into separate cost pools for protocol processing support and for store and forward support, and then to apply the individual usage measurements to the respective cost pools. If this is the case, Pacific's further revisions shall list these separate cost pools and make clear the basis on which they are to be apportioned. If this is not the case, Pacific must explain how it proposes to combine its usage measurement for protocol processing and its usage measurement for store and forward services into a single apportionment factor.

49. *Store and Forward Services.* These services, as defined by Pacific, consist of voice mail and electronic messaging services. Voice mail would provide Pacific's customers with telephone answering and voice messaging services. The voice messaging services would enable subscribers to send and receive messages, to respond to received messages, and to send the same message simultaneously to groups of people. Users of Pacific's electronic messaging services would employ Pacific's public packet switching network to send and retrieve electronic mail. Several aspects of Pacific's proposals for these services require correction.

50. First, Pacific states that it will implement its electronic messaging services internally before offering them for public trial. Pacific proposes to attribute all costs associated with the implementation of the internal service to regulated activities.[84] That proposal is inconsistent with our requirement that Pacific apportion the costs of official communications plant that is not provided at tariffed rates in proportion to the relative regulated and nonregulated usage of that plant.[85] Pacific shall provide for such an apportionment in its further revisions.

51. Second, Pacific proposes to count customer account mailboxes to measure nonregulated usage of the digital electronic switching equipment that it would use to provide both store and forward and regulated services.[86] Although customer account mailbox counts may be an accurate measure of nonregulated usage for this equipment, Pacific has failed to state how it intends to measure regulated and total usage of this equipment and why those usage measurements might be appropriate. Pacific must correct these defects in its further revisions. If Pacific intends to use total customer accounts as its total usage measurement for these cost pools,[87] it must make that intent explicit.

52. Third, Pacific proposes "Directly Attributable Joint" cost pools within Accounts 2212 and 6212 for system administrator equipment that would help monitor Pacific's store and forward operations. As its nonregulated usage measurement for this equipment, Pacific proposes "weighted" customer account mailboxes without stating what its "weight[ing] factor might be or explaining why use of that factor might be appropriate."[88] Pacific must also correct these defects in its further revisions.

53. *Gateway Services.* Pacific's revisions states that these services, which Pacific does not yet provide, will provide subscribers with an easy means of using the telephone network to locate, select, access, and interact with data

bases maintained by videotex Enhanced Services Providers (ESPs). In addition, Pacific states that it will also provide billing to ESP customers who access the ESP through the gateway and may provide storage within the gateway for ESP data bases.[89] Pacific's revisions introduce "Directly Attributable Joint" cost pools into Accounts 2212 and 6212 for gateway services. As its apportionment factors for these pools, Pacific proposes to employ "CPU seconds per year" and "CPU seconds used during month," respectively, once it starts providing gateway services.[90] In its further revisions, Pacific must clarify that the usage it will measure in calculating these apportionment factors will be restricted to usage of the plant whose costs are recorded in these cost pools.[91]

54. *Nevada's Enhanced Services.* In its revisions, Nevada states that it will provide two enhanced services -- CDAR and voice mail.[92] Because Nevada's CDAR operations are, and likely will continue to be, quite limited,[93] we will not require major changes in Nevada's apportionment proposals for CDAR at this time.[94] However, Nevada's revisions propose no method for apportioning costs to its voice mail services.[95] Nevada's further revisions shall either propose such a method or delete voice mail from its list of nonregulated activities.

G. Apportionment Proposals - Pacific

Account 2111 - Land and Account 2121 - Buildings

55. In its initial manual, Pacific stated that it would perform an "[i]nternal study using functional characteristics of space usage" to assign its land investment to cost pools."[96] In the *Nevada and Pacific Order*, we required Pacific to explain this study's parameters so we could assess whether it would yield accurate results.[97] In its revised manual, Pacific states that it maintains a building and space usage data base, which "based on internal studies," classifies total building space usage into functional categories, such as central office equipment space and operator systems space.[98] Pacific states further that it calculates the ratio of usage in each functional category to total building space usage and multiplies that ratio times total building investment to determine the building investment to be assigned to each category.[99] The revised manual indicates that Pacific applies the same ratios to Pacific's total land investment to determine the land investment to be assigned to the respective categories.[100]

56. We believe that Pacific's method is not cost causative, because it fails to recognize that land and building costs vary with building function. Therefore, we require Pacific to assign its land and building costs to cost pools on a building-by-building basis, as follows. First, while Pacific has not described the "internal studies" that generate the building space usage information in its data base, those studies should identify the number of square feet within each of Pacific's building that are used for each of the functional categories for which Pacific has costs pools within these accounts. Second, for each of its buildings, Pacific shall divide these square footage figures by Pacific's total square footage within that building to determine the percentage of the building that supports each of Pacific's functional categories. Third, Pacific shall multiply each of these percentages by Pacific's investment in the building to which it relates and in the land associated with that building to determine the investment to be assigned for that building to each of Pacific's cost pools within Accounts 2111 and 2121. This process shall be repeated for each building in which Pacific has investment and for the land associated with each such building to determine the total investment to be assigned to those cost pools. In addition, Pacific shall update this study annually and whenever significant changes to its land or building usage occur.[101] Pacific shall amend its manual accordingly.

Account 2681 - Capital Leases

57. In its initial manual, Pacific proposed to apportion a series of cost pools within Account 2681, including cost pools for land subject to capital leases and buildings subject to capital leases, between regulated and nonregulated activities in proportion to the relative distribution of the corresponding investment accounts. Since Pacific's method improperly assumed that regulated and nonregulated activities utilize leased investment and owned investment in similar proportions, we required Pacific to assign its capital lease investments directly to regulated and nonregulated activities to the extent practicable. We also required Pacific to apportion those capital lease investments that could not be directly assigned using the methodology Pacific would employ for functionally equivalent, owned investment.[102] In its revised manual, Pacific proposes cost pool assignment and apportionment methods for its capital lease investment that generally comply with our Order. However, Pacific states that it will assign its investments in land and buildings that are subject to capital leases to cost pools using methods similar to those it proposed for its investment in owned land and buildings. Consistent with our treatment of that investment,[103] we require Pacific to amend its manual to specify that it will use square footage ratios calculated on a building-by-building basis to apportion its investments in land and buildings that are subject to capital leases.

Account 2682 - Leasehold Improvements

58. Pacific's initial manual proposed to apportion this account between regulated and nonregulated activities in the same proportion as its apportionment of its building investment. Because we believed that Pacific leasehold improvement costs are unrelated to the relative use of Pacific's owned buildings, we required Pacific to apportion these costs on a more cost causative basis. We suggested individual analysis as one possible apportionment method.[104] In its revised manual, Pacific indicates that its volume of leasehold improvements makes individual analysis unfeasible and proposes to use the method it proposes for its building investment. Consistent with our treatment of that investment,[105] we require Pacific to amend its manual to specify that it will use square footage ratios calculated on a building-by-building basis to apportion its leasehold improvement investment.

Account 3100 - Accumulated Depreciation and Account 6561 - Depreciation Expense - Telecommunications Plant in Service

59. In the *Joint Cost Order*, the Commission specified that carriers must apportion Account 3100 at the USOA account level.[106] Since Pacific's initial manual did not comply with this requirement, we ordered Pacific to provide for such an apportionment in its revised manual.[107] We also determined that Pacific should adopt a similar approach for Account 6561. We stated that Pacific's revised manual should include a separate cost pool within Account 6561 for each of the major plant accounts and

that each of these cost pools should be apportioned between regulated and nonregulated activities based on the apportionment of the plant account to which it corresponds.[108]

60. We have been unable to determine whether Pacific complied with these requirements. First, Pacific's revised manual sets forth markedly different cost pool structures for the two accounts, listing "Directly Assigned Regulated," "Directly Assigned Nonregulated," and "Residual" cost pools in Account 3100[109] and "Directly Assigned Regulated" and "Directly Attributable Investment Related" cost pools in Account 6561.[110] Although Pacific apparently intends to subdivide its "Residual" cost pool in Account 3100 and its "Directly Attributable Investment Related" cost pool in Account 6561 into additional cost pools,[111] Pacific has not made clear how these additional pools would make the cost pool structures of the two accounts similar. To ensure that Pacific complies with our prior Order, we require that Pacific create a cost pool within Account 3100 corresponding to each cost pool that it creates within Account 6561 and that Pacific's further revisions list each cost pool that it will derive from this "Residual" cost pool.

61. Second, the revised manual proposes to apportion Pacific's shared cost pools in Accounts 3100 and 6561 between regulated and nonregulated activities in proportion to investment in corresponding plant accounts, but does not make clear whether Pacific will exclude all investment associated with its direct assignment cost pools within Accounts 3100 and 6561 from the calculation of its apportionment factors for these shared pools. Since such a failure could result in the misapportionment of Pacific's depreciation reserves and depreciation expenses,[112] we require that Pacific's further revisions list the investment cost pools that correspond to each of its depreciation reserve and depreciation expense cost pools. If any cost pools within Accounts 3100 and 6561 are to be assigned directly to regulated or nonregulated activities, Pacific shall specify that the investment to which those cost pools relate will be excluded from the calculation of the apportionment factors for its shared cost pools within those accounts.

Account 6121 - Land and Building Expense

62. In its initial manual, Pacific proposed to apportion its shared cost pool within this account in proportion to the relative apportionment of its building investment in Account 2121. Because we believed that Pacific's method might be insufficiently cost causative, we required that Pacific either apportion operating rent expense separately or justify why such an apportionment should not be mandated.[113] While Pacific's revised manual proposes to apportion rent expense separately, Pacific proposes to perform that apportionment using the method it proposes for its building investment. Consistent with our treatment of that investment,[114] we require Pacific to amend its manual to specify that it will use square footage ratios calculated on a building-by-building basis to apportion its operating rent expense.

Account 6531 - Power Expense

63. In the *Nevada and Pacific Order*, we suggested that Pacific might want to revise its cost pool structure for this account in recognition of the changes it would be making in its apportionment methods for its network plant investment.[115] In response, Pacific proposes to divide this account into cost pools for "Power Expense-Directly Assigned Regulated" and "Power Expense-Indirectly Attributable." Pacific also proposes to apportion this "Indirectly Attributable" cost pool between regulated and nonregulated activities in the same proportion as its apportionment of Accounts 2211 through 2232.[116] Pacific, however, is directly assigning large portions of its investment in those accounts directly to regulated activities. We believe that Pacific may be assigning the costs of the power that supports this directly assigned investment to its "Directly Assigned Regulated" cost pool within Account 6531. If our belief is correct, then the inclusion of that investment in the calculation of the apportionment factor for the "Indirectly Attributable" cost pool in that account would result in an overallocation of Pacific's power expense to regulated activities.[117] Pacific must amend its manual to specify that it will exclude all investment supported by this "Directly Assigned Regulated" cost pool from the calculation of that apportionment factor.

Account 6534 - Plant Operations Administration Expense

64. In its initial manual, Pacific proposed to apportion its "Other" cost pool within this account between regulated and nonregulated activities "using appropriate plant expenses.[118] After we ordered Pacific to explain the costs that would be included in this pool,[119] Pacific specified that the pool will consist of residual plant specific supervision, plant unclassified productive time, and headquarters support costs.[120] Pacific, however, continues to propose "using appropriate plant expenses" to apportion this "Other" pool,[121] and has not made clear what plant expenses it deems "appropriate." In its further revisions to its manual, Pacific shall explain the expenses it intends to use to apportion this cost pool and why use of those expenses would result in an accurate apportionment of the pool between regulated and nonregulated activities.

Account 6535 - Engineering Expense

65. In its initial manual, Pacific proposed to apportion its "Support Costs" cost pool within this account between regulated and nonregulated activities in the "same proportion as previously assigned and attributed wages and salaries in appropriate related" company subaccounts within this account.[122] After we ordered Pacific to explain the costs that would be included in these pools,[123] Pacific amended one portion of its manual to state that this pool will consist of expenses associated with "engineering services performed for land and buildings, customer services, network central office engineering and planning, operations, transmissions, network trunking, operator services facilities and other related functions in Account 6535.[124] However, another portion of Pacific's revisions states that this cost pool will consist of "Residual Engineering, Supervision, unclassified productive time and administrative costs."[125] We are unable to reconcile these divergent descriptions of this cost pool. Pacific shall do so in its further revisions to its manual.[126]

66. Pacific's revisions continue to propose that this cost pool be apportioned in the "same proportion as previously assigned and attributed wages and salaries in appropriate related" company subaccounts.[127] Since we find this apportionment method unclear, Pacific's further revisions shall also explain Pacific's apportionment method for this cost pool and why that method would result in an accurate apportionment of the pool between regulated and nonregulated activities.[128]

Account 6611 - Product Management, Account 6612 - Sales, and Account 6613 - Product Advertising

67. Pacific's initial manual proposed to apply the marketing allocator to the "Residual" cost pools that Pacific had created within these accounts.[129] In the *Nevada and Pacific Order*, we required Pacific to justify these proposals.[130] In its revised manual, Pacific maintains the marketing allocator for these cost pools and states that these pools contain "costs attributable to common support and supervision." [131] We are unconvinced by Pacific's statements. Pacific indicates that it is directly assigning or attributing the bulk of its product management, sales, and product advertising wages and salaries to regulated and nonregulated activities. If, as Pacific's statement suggests, these "Residual" costs are incurred in supervising or supporting functions whose costs are being directly assigned, then they should be apportioned in proportion to the directly assigned and attributed costs. If Pacific considers this improper, there may be activities in the "Residual" pools in addition to such supervisory and support functions. If this is the case, Pacific should divide these pools into separate pools for such supervisory and support functions and for other product management, sales, and product advertising costs. Pacific must clarify these matters in its further revisions to its manual.[132]

Account 6725 - Legal

68. In the *Nevada and Pacific Order*, we ordered Pacific to create a separate cost pool within this account for overhead costs and to apportion this cost pool in proportion to the relative apportionment of the non-overhead legal expenses that Pacific is able to directly assign or attribute.[133] Pacific's revised manual lists a "Directly Attributable Support Costs" cost pool for Account 6525 that is being apportioned in the "same proportion as directly assigned and attributed wages and salaries in this account."[134] In its further revisions, Pacific must explain why this apportionment factor is based on directly assigned and attributed wages and salaries, rather than on all directly assigned and attributed non-overhead costs, in this account. In addition, to avoid any potential for future confusion as to the treatment of Pacific's legal overhead expenses, Pacific shall also revise its cost table to specify that the "Residual" cost pool listed for this account contains no overhead costs.

Account 7220 - Operating Federal Income Taxes, Account 7230 - Operating State and Local Income Taxes, and Account 7250 - Provision for Deferred Operating Income Taxes - Net

69. Pacific did not include any procedures for apportioning these accounts in its initial manual. We required Pacific to provide the procedures for apportioning such missing accounts.[135] Pacific's revision combines Accounts 7220 and 7250, and Accounts 7350 and 7550. In each combined account, Pacific establishes four cost pools. Certain income taxes and deferred taxes are directly assigned to regulated and nonregulated on the basis of a calculation that Pacific states is "identical to an allocation based on taxable income."[136] However, the other two cost pools (Income Adjustments for Income Tax" and "Tax Rate Change plus Other Adjustments) are apportioned on the basis of investment or by developing ratios based on plant records. Pacific's reliance on plant as an apportionment basis for operating income taxes is not adequately explained, and is inconsistent with our direction to Nevada for apportioning its income taxes.[137] Pacific accordingly must revise its manual to apportion these accounts on book income.

Account 7991 - Other Nonregulated Revenues

70. In the *Nevada and Pacific Order*, we required Pacific to include apportionment proposals for Account 5301 - Uncollectible Revenue-Telecommunications and Account 5302 - Uncollectible Revenue-Other in its revised manual.[138] In response, the revised manual lists these accounts and proposes to directly assign them to regulated activities. Pacific states that it calculates nonregulated uncollectibles separately and records them, along with all its nonregulated revenue, in Account 7991.[139] The manual, however, does not list Account 7991.

71. Although Pacific's use of Account 7991 appears consistent with the Commission's present accounting rules, the *Further Reconsideration Order* deleted Account 7991 and added Account 5280 - Nonregulated operating revenue.[140] Those rule changes will become effective on May 22, 1989. In the *Further Reconsideration Order*, the Commission also determined that it is essential to our monitoring efforts that cost manuals list any account in which carriers record revenues derived from nonregulated activities to which the manual apportions costs.[141] Therefore, Pacific must revise its manual to list Account 5280 prior to that effective date. It is also essential that the manual specify the procedures Pacific employs to divide the uncollectible revenue among its revenue accounts. Therefore, we require that Pacific specify those criteria in its further revisions. Those criteria shall make clear that Pacific apportions uncollectible revenue related to telecommunications activities in proportion to relative telecommunications revenue and uncollectible revenue related to non-telecommunications activities in proportion to relative non-telecommunications revenue.[142]

H. Apportionment Proposals - Nevada

Account 1439 - Deferred Charges

72. In the *Nevada and Pacific Order*, we required Nevada to add a number of accounts to its manual, including Account 1439.[143] In its revised manual, Nevada has introduced this account and divided it into six cost pools. One of these is "Voluntary Employee Benefit Association Trust," which is directly assigned to regulated.[144] The comments column states that, because the trust was created prior to the effective date of the *Joint Cost Order*, its is all regulated and the remaining balance is entirely reserved for retired employees.[145]

73. The fact that establishment of the fund preceded the *Joint Cost Order* does not necessarily imply that none of this cost pool is attributable to nonregulated activities. The employees who have already retired may well have been involved with activities or items of plant which were nonregulated before that Order's effective date or which have since then become nonregulated. It is not clear whether Nevada is denying that the fund will ever be used for future retirees, but if it were, then some portion should almost certainly be attributable to nonregulated activities. Accordingly, we direct Nevada to apportion this cost pool in the same proportion as all directly assignable or directly and indirectly attributable wages and salaries.

Account 6533 - Testing Expense

74. Nevada maintains this account as a single cost pool to be directly assigned to regulated. The comments column states that in the event a nonregulated activity uses cable and wire facilities, these costs will be measured at tariffed rates.[146] Carriers normally use central office equipment to test their inside wiring installation and maintenance work. Since the Commission's rules require that inside wiring installation and maintenance work be tested, there is a distinct possibility that otherwise regulated central office facilities would be used for this nonregulated purpose.[147] Accordingly, we direct Nevada either to clarify that no part of the expense in this account will be incurred for the testing of inside wiring or to establish a shared cost pool for testing expense. If such a cost pool is needed, it should be apportioned by the relative proportion of tests for inside wiring to total tests over the relevant time period.

Account 6535 - Engineering Expense

75. Nevada maintains this account with five cost pools, one of which is for "Shared Customer Services." This cost pool is apportioned by the relative value of a number of investment accounts, including Account 2321 - Customer premises wiring, an account that Nevada is directly assigning to regulated activities.[148] Nevada should not be recording any current inside wiring costs in Account 2321, and any engineering expense Nevada incurs in connection with its inside wiring operations should be apportioned to nonregulated activities.[149] We require Nevada to amend its cost table to delete Account 2321 from this allocator.

Account 6611 - Product Management, Account 6612 - Sales, and Account 6613 - Product Advertising

76. In its initial manual, Nevada divided each of these accounts into two directly assigned cost pools for regulated and nonregulated, respectively.[150] In the *Nevada and Pacific Order*, we required Nevada to explain why it had no cost pool for common expenses in these accounts.[151] In its revised manual, Nevada has added two common cost pools to these accounts: "Benefits" cost pools, to be apportioned based the relative proportion of wages and salaries for all the directly assigned costs, and "Other" cost pools, to be apportioned using the marketing allocator.[152] In accordance with our previous discussion regarding Pacific's apportionment of these accounts,[153] we direct Nevada to clarify whether the costs of common support and supervision are included within these "Other" cost pools. If so, then the marketing allocator should be replaced for these costs by an allocator based on all the previously assigned and attributed wages and salaries, applied either to the the whole cost pool or to a newly created one for support and supervision only.

Account 6711 - Executive

77. Nevada maintains this account with only one cost pool, to be apportioned by the general allocator.[154] We believe that many functions associated with Nevada's corporate executive office can be directly assigned or directly attributed on a more cost causative basis than the general allocator. Therefore, we require Nevada to further amend its manual to reflect a more discriminating analysis of these costs or to justify in detail why general allocation would produce an accurate apportionment of its executive costs between regulated and nonregulated activities.[155]

Account 6726 - Procurement

78. Nevada has provided for apportionment of its currently offered CDAR costs in Account 2211 - Analog electronic switching and Account 2212 - Digital electronic switching, but not in Account 6726.[156] Since some amount of procurement cost is inevitable in the actual provision of this service, Nevada must establish an apportionment methodology for that expense, using the same direct attribution basis as in the two switching plant cost pools.

Account 7991 - Nonregulated Revenues

79. In its initial manual, Nevada provided a single cost pool for each of Accounts 5301 and 5302, to be directly assigned to regulated or nonregulated based on relative revenues.[157] In the *Nevada and Pacific Order*, we required Nevada to clarify its apportionment methodology and to allocate its telecommunications uncollectibles and its other uncollectibles by the relative regulated and nonregulated revenues in each corresponding revenue account, respectively.[158] In its revised manual, Nevada has provided that the single cost pool for each of these uncollectibles accounts is to be directly assigned to regulated. In the comments column entry for each of them, Nevada states that all nonregulated uncollectibles are to be assigned to a corresponding subaccount in Account 7991.[159] Nevada, however, does not include this account in its cost table and does not clearly show how the uncollectible revenues are divided between its revenue accounts.

80. As we stated in our discussion of Pacific's manual, the *Reconsideration Order* deleted Account 7991 and added Account 5280.[160] Like Pacific, Nevada must revise its manual to list Account 5280 prior to the May 22, 1989 effective date of those changes. Nevada must also specify in its further revisions that it will divide its uncollectible revenue among its revenue accounts using the criteria we specified for Pacific.[161]

Account 7250 - Deferred Operating Income Taxes

81. Nevada has complied with our requirement that operating income taxes be allocated on the basis of book income. However, Nevada states in the comments section of Account 7250 "*See* discussion of the general allocator in Section VII(C)(4)."[162] This statement is unclear, because the referenced section does not describe any relationship between deferred operating income taxes and the general allocator. Nevada must revise its manual to either delete the reference or describe fully that relationship.

III. ORDERING CLAUSES

82. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), that Nevada Bell's and Pacific Bell's March 21, 1988, June 30, 1988, and September 30, 1988 revisions to their Cost Allocation Manuals ARE APPROVED, subject to the conditions stated in this Order.

83. IT IS FURTHER ORDERED that the revisions required herein shall be filed no later than January 31, 1989.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, *Report and Order*, CC Docket 86-111, 2 FCC Rcd 1298 (1987) (*Join t Cost Order), recon.*, 2 FCC Rcd 6283 (1987) (*Reconsideration Order), further recon.*, FCC 88-355 (released Nov. 18, 1988)(*Further Reconsideration Order), petitions for review pending*, Southwestern Bell Tel. Corp. v. FCC, D.C. Circuit No. 87-1764 (filed Dec. 14, 1987); National Tel. Cooperative Ass'n v. FCC, D.C. Circuit No. 87-1771 (filed Dec. 15, 1987).

[2] Nevada Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs and Pacific Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 287 (1988) (*Nevada and Pacific Order*).

[3] *Id.* at 287, paras. 2-3; *id.* at 300, para. 121.

[4] Nevada Revised Manual, "Compliance Filing," p. 17; Pacific Revised Manual, "Compliance Filing," pp. 44-45.

[5] *See North American Telecommunications Ass'n*, FCC Rcd 4385, 4392, para. 50 (1988) (*NATA / Centrex Reconsideration Order*).

[6] Nevada and Pacific may defer their December 31, 1988 quarterly updates, if any, until that date.

[7] *Nevada and Pacific Order*, 3 FCC Rcd at 287, para. 3.

[8] With regard to those revisions that Nevada and Pacific claim they cannot make retroactively, we reserve the right to require either retroactivity or subsequent adjustments to reflect the impact of the lack of retroactivity on 1988 operations.

[9] *Nevada and Pacific Order*, 3 FCC Rcd at 288, paras. 7-8; *see also Joint Cost Order*, 2 FCC Rcd at 1317-19, paras. 147-64.

[10] *Nevada and Pacific Order*, 3 FCC Rcd at 288, paras. 6-7.

[11] MCI Comments at 3-5.

[12] *Id.* at 5.

[13] *Id.* at 5-8.

[14] Nevada and Pacific Reply at 3-4.

[15] *Id.* at 4-6.

[16] *Id.* at 6-7.

[17] *Nevada and Pacific Order*, 3 FCC Rcd at 288, paras. 6-8.

[18] *See Reconsideration Order*, 2 FCC Rcd at 6305, para. 191.

[19] *See Joint Cost Order*, 2 FCC Rcd at 1355, n.390; *accord Reconsideration Order*, 2 FCC Rcd at 6305, para. 191.

[20] *Cf. Joint Cost Order*, 2 FCC Rcd at 1355, n.390 (level of detail is comparable to that in Separations Manual, not that in the former Division of Revenues procedures).

[21] *See id.* at 1333, para. 274.

[22] *Id.* at 1329, para. 242; *id.* at 1334, para. 283.

[23] *See id.* at 1333, para. 274.

[24] Pacific Initial Manual at pp. 5-6 to 5-7; *id.* at Charts 3-4.

[25] *Nevada and Pacific Order*, 3 FCC Rcd at 289, paras. 13-16.

[26] Pacific Revised Manual at pp. 7-1 to 7-30.

[27] *Id.* at p. 7-4.

[28] *Joint Cost Order*, 2 FCC Rcd at 1318, para. 161.

[29] Pacific Revised Manual at p. 7-20.

[30] *See id.*

[31] *Id.* at p. 7-24.

[32] *Id.* at p. 7-12.

[33] *See Joint Cost Order*, 2 FCC Rcd at 1336, para. 299; *Reconsideration Order*, 2 FCC Rcd at 6297, paras. 130-31; 47 C.F.R. §32.27(d); U S West's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 195, 199, para. 33 (1988) (*U S West Order*).

[34] *Reconsideration Order*, 2 FCC Rcd at 6297, paras. 130-31.

[35] Pacific Revised Manual at p. 7-25.

[36] *See, e.g.*, Nevada Initial Manual at 14, 17.

[37] *Nevada and Pacific Order*, 3 FCC Rcd at 288, paras. 10-12.

[38] *See, e.g.*, Nevada Revised Manual at pp. V-1 to V-6.

[39] *See* para. 18, *supra*.

[40] Nevada Revised Manual at V-3 to V-4.

[41] *Id.* at V-3.

[42] *Compare* Nevada Revised Manual at V-3 *with* Pacific Revised Manual at pp. 7-23 to 7-24.

[43] Pacific Initial Manual at pp. 5-4 to 5-5.

[44] *Nevada and Pacific Order*, 3 FCC Rcd at 290, paras. 24-25.

[45] Pacific Revised Manual at pp. 6-1 to 6-6.

[46] *Id.* at p. 6-2.

[47] *See* Nevada Initial Manual at 15-16.

[48] *Nevada and Pacific Order*, 3 FCC Rcd at 290, paras. 22-23.

[49] Nevada Revised Manual at pp. VI-1 to VI-3.

[50] *Nevada and Pacific Order*, 3 FCC Rcd at 290, para. 28.

[51] Pacific Revised Manual at pp. 2-3 to 2-5.

[52] *See id.*

[53] *See generally Nevada and Pacific Order*, 3 FCC Rcd at 290, para. 28.

[54] Pacific Revised Manual at p. 2-4. While the manual states that the technicians report their time to this nonregulated code whenever the customer knows the cause of the trouble, we assume they report to a regulated code when the customer identifies a network problem.

[55] *Id.* at pp. 2-4 to 2-5.

[56] *See* para. 5 & note 8, *supra*.

[57] *See* Pacific Initial Manual, Chart 4, pp. 3, 7.

[58] *Nevada and Pacific Order*, 2 FCC Rcd at 293-94, paras. 56-58.

[59] Pacific Revised Manual at pp. 3-8 to 3-10, 8-68.

[60] *Id.* at pp. 3-8 to 3-10.

[61] *Id.* at p. 3-9.

[62] *See* Pacific Revised Manual at 5-7 to 5-8.

[63] This topic is also addressed in paragraph 50, *infra*.

[64] *Nevada and Pacific Order*, 3 FCC Rcd at 294, para. 59.

[65] Nevada Revised Manual at III-8.

[66] *E.g., Nevada and Pacific Order*, 3 FCC Rcd at 294-95, para. 65.

[67] Pacific Revised Manual at pp. 8-28 to 8-29.

[68] *See id.* at pp. 8-54 to 8-55.

[69] *See NATA/Centrex Reconsideration Order*, 3 FCC Rcd at Appendix A.

[70] Pacific Revised Manual at p. 5-9.

[71] *See Nevada and Pacific Order*, 3 FCC Rcd at 289, para. 19.

[72] *See* paras. 40-41, *supra*.

[73] Pacific Revised Manual at p. 8-28 to 8-29.

[74] We will, of course, monitor the effect of this and other apportionment factors that Pacific proposes for its enhanced services, and revisit those factors in the event they produce inaccurate results. *See Ameritech Operating Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs*, 3 FCC Rcd 433, 440, para. 59 (1988) *(Ameritech Order)*.

[75] Pacific Revised Manual at p. 8-54.

[76] *Joint Cost Order*, 2 FCC Rcd at 1320, para. 173; *see also Nevada and Pacific Order*, 3 FCC Rcd at 295, para. 76.

[77] Although our rejection of Pacific's proposal to apportion its CDAR cost pools within Accounts 6211 and 6212 in proportion to peak forecast usage makes it unnecessary to address the particular apportionment factors Pacific proposes for those pools, we note that unexplained references to items such as "Acct. 2211; FRC 77 C" are unacceptable in a cost allocation manual. Cf. *Nevada and Pacific Order*, 3 FCC Rcd at 292, paras. 47-49.

[78] *Id.* at 295, para. 66.

[79] Pacific Revised Manual at pp. 8-29, 8-55.

[80] *Id.* at p. 3-3.

[81] *See Joint Cost Order*, 2 FCC Rcd at 1318-19, para. 161.

[82] Pacific Revised Manual, at pp. 3-2 to 3-3.

[83] *See id.* at p. 8-47.

[84] *Id.* at p. 5-7.

[85] *See U S West Order*, 3 FCC Rcd at 201-02, paras. 56-58.

[86] Pacific Revised Manual at pp. 8-29, 8-55.

[87] Pacific proposes total customer accounts as its usage measurement for other "Directly Attributable Joint" cost pools that support its store and forward services. *See, e.g., id.* at p. 8-47; *see also* para. 48, *supra*.

[88] Pacific Revised Manual at pp. 8-29, 8-55.

[89] *Id.* at p. 5-11.

[90] *Id.* at pp. 8-29, 8-55.

[91] *See* para. 47, *supra*.

[92] Nevada Revised Manual at IV-4.

[93] *See id.* at III-5.

[94] In paragraph 77, *infra*, we address Nevada's procurement costs for CDAR.

[95] *See id.* at V-5, V-15.

[96] Pacific Initial Manual at 5.

[97] *Nevada and Pacific Order*, 3 FCC Rcd at 294, para. 63.

[98] *Pacific Revised Manual, "Compliance Filing,"* p. 22; *id.* at pp. 4-3 to 4-4; *id.* at p. 8-19.

[99] *Id.* at p. 8-19.

[100] *Id.* at p. 4-5.

[101] This method is similar to the methods we have approved for other carriers. *See, e.g.*, NYNEX Revised Manual at 75, approv ed NYNEX Telephone Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd at 5978 (1988) *(NYNEX Compliance Order)*.

[102] *Nevada and Pacific Order*, 3 FCC Rcd at 295, para. 70.

[103] *See* para. 56, *supra*.

[104] *Nevada and Pacific Order*, 3 FCC Rcd at 295, para. 71.

[105] *See* para. 56, *supra*.

[106] *Joint Cost Order*, 3 FCC Rcd at 1326, paras. 218-20.

[107] *Nevada and Pacific Order*, 3 FCC Rcd at 295, para. 72.

[108] *Id.* at 296, para. 80.

[109] Pacific Revised Manual, "Compliance Filing," pp. 27, 33-34; *id.* at pp. 8-43, 8-63.

[110] *Id.*, "Compliance Filing," pp. 33-34; p. 8-63.

[111] *Id.*, "Compliance Filing," pp. 27, 33-34; *id.* at pp. 8-43, 8-63.

[112] *See BellSouth Corporation's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs*, FCC 88-1840, para. 23 (adopted November 25, 1988) *(BellSouth Compliance Order); see also Ameritech Operating Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs*, 3 FCC Rcd 5883, 5889, para. 37 (1988) *(Ameritech Compliance Order)*.

[113] *Nevada and Pacific Order*, 3 FCC Rcd at 295-96, para. 75.

[114] *See* para. 56, *supra*.

[115] *Nevada and Pacific Order*, 3 FCC Rcd at 296, para. 77.

[116] Pacific Revised Manual at p. 8-59.

[117] Cf. *Ameritech Compliance Order*, 3 FCC Rcd at 5887, para. 37.

[118] Pacific Initial Manual at 29.

[119] *Nevada and Pacific Order*, 3 FCC Rcd at 296, para. 79.

[120] Pacific Revised Manual at "Compliance Filing," p. 33; *compare id.* at p. 8-61.

[121] *Id.* at p. 8-61.

[122] Pacific Initial Manual at 30.

[123] *Nevada and Pacific Order*, 3 FCC Rcd at 296, para. 79.

[124] Pacific Revised Manual at "Compliance Filing," p. 33.

[125] *Compare id. with id.* at p. 8-62.

[126] Those further revisions shall not use terms such as "other related functions" to describe the contents of this cost pool.

[127] Pacific Revised Manual at p. 8-62.

[128] Cf. *Nevada and Pacific Order*, 3 FCC Rcd at 292, para. 48.

[129] Pacific Initial Manual at 32-34.

[130] *Nevada and Pacific Order*, 3 FCC Rcd at 296, paras. 81-82.

[131] Pacific Revised Manual, "Compliance Filing," p. 35.

[132] *See BellSouth Compliance Order, supra*, slip op. at para. 34.

[133] *Nevada and Pacific Order*, 3 FCC Rcd at 297, para. 88.

[134] Pacific Revised Manual at p. 8-75.

[135] *Nevada and Pacific Order*, 3 FCC Rcd at 292, para. 45.

[136] Pacific Revised Manual at pp. 8-71 to 8-72.

[137] *See Nevada and Pacific Order*, 3 FCC Rcd at 299-300, paras. 114-15.

[138] *Id.* at 292, paras. 44-45.

[139] Pacific Revised Manual at pp. 3-11 to 3-12, 8-47.

[140] *Further Reconsideration Order*, slip op. at 12, para. 12.

[141] *Id.* at 9, n.10.

[142] *See U S West Order*, 3 FCC Rcd at 206, para. 104.

[143] *Nevada and Pacific Order*, 3 FCC Rcd at 292, para. 44; *id. at 298, para. 95*.

[144] Nevada Revised Manual, "Cost Apportionment Table," p. 2.

[145] *Id.*

[146] Nevada Initial Manual at 34; Nevada Revised Manual, "Cost Apportionment Table," p. 17. Although we did not raise this issue in the *Nevada and Pacific Order*, it is sufficiently important to warrant action at this time.

[147] 47 C.F.R. §§68.213, 68.215.

[148] Nevada Initial Manual at 35; Nevada Revised Manual at "Cost Apportionment Table," p. 18. Although this specific issue was not addressed in the *Nevada and Pacific Order*, it is sufficiently important to warrant action at this time.

[149] *See BellSouth Corporation's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs*, 3 FCC Rcd 128, 136, para. 76. (1988) *(BellSouth Order)*.

[150] Nevada Initial Manual at 37.

[151] *Nevada and Pacific Order*, 3 FCC Rcd at 299, para. 106.

[152] Nevada Revised Manual, "Cost Allocation Table," p. 20.

[153] *See* para. 67, *supra*.

[154] Nevada Initial Manual at 38; Nevada Revised Manual at "Cost Apportionment Table," p. 21. We did not raise this issue in the *Nevada and Pacific Order*. However, we believe this issue is sufficiently important to warrant action at this time.

[155] *See NYNEX Order*, 3 FCC Rcd at 91, para. 87.

[156] Nevada Revised Manual, "Cost Apportionment Table," pp. 5, 23.

[157] Nevada Initial Manual at 29. The manual does not make it clear whether both allocators use total revenues or each uses telecommunications revenues and other revenues, respectively.

[158] *Nevada and Pacific Order*, 3 FCC Rcd at 298, para. 101.

[159] Nevada Revised Manual, "Cost Apportionment Table," p. 12.

[160] *See* para. 71, *supra*.

[161] *Id.*

[162] Nevada Revised Manual at 26.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-223

In re Applications of

RICHARD P. BOTT, II File No. BPH-850711MM

RADIO REPRESENTATIVES, INC. File No. BPH-850711MO

CLARE MARIE FERGUSON File No. BPH-850712MS

For Construction Permit for
a New FM Station in
Blackfoot, Idaho

Appearances

Barry A. Friedman, and *Michael Drayer*, on behalf of Richard P. Bott, II; *Dan J. Alpert*, on behalf of Radio Representatives, Inc.; and *J. Dominic Monahan*, and *Thomas J. Hutton*, on behalf of Clare Marie Ferguson.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE
EDWARD LUTON

Issued: November 30, 1988; Released: December 12, 1988

I. PRELIMINARY STATEMENT

1. This proceeding involves the mutually exclusive applications of Richard P. Bott, II (Bott), Radio Representatives, Inc. (RRI), and Clare Marie Ferguson (Ferguson), for authority to construct and operate a new FM radio station on Channel 268C at Blackfoot, Idaho. On July 1, 1987, the Chief, Audio Services Division, designated seven applications for hearing, including two applications which were contemporaneously dismissed and two others which were subsequently dismissed.

2. The following issues were designated in the *Hearing Designation Order* with respect to the three applicants which remain parties to this proceeding:

> 1. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicants would constitute a hazard to air navigation: Bott; Ferguson.
>
> 2. To determine which of the proposals, on a comparative basis, best serve the public interest.
>
> 3. To determine, in light of the evidence adduced pursuant to the foregoing, which of these applications should be granted, if any.

In addition, the *Hearing Designation Order* noted that there would be a significant difference in the size of the area and population that each applicant proposes to serve, and thus that "the areas and populations which would receive FM service of one MV-M or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

3. By *Memorandum Opinion and Order*, FCC 87M-2524, released October 9, 1987, a site availability issue was added against the application of Clare Marie Ferguson. That issue, and the air hazard issue designated against Ferguson were resolved in Ferguson's favor by summary decision. *See Order*, FCC 87M-3238, released December 10, 1987. The air hazard issue designated against Bott's application was resolved in Bott's favor by summary decision granted orally. Tr. 16.

4. A prehearing conference was held on September 1, 1987. A hearing session was held on December 2, 1987 and the record was closed on that date.

II. FINDINGS OF FACT

Richard P. Bott, II

5. Bott is an individual applicant. He proposes to serve as the General Manager of the Blackfoot station, working there full-time, at least 40 hours per week. Bott Ex. 3; Bott Ex. 4. As the General Manager, Bott proposes to supervise all personnel and be responsible for all day-to-day operations in the areas of programming, promotion, technical operations, and business affairs. Bott Ex. 3.

6. Bott has lived in Kansas City, Missouri, for approximately the last four years. He will move to Blackfoot, Idaho, and make that his residence if his application is granted.

7. Bott received a Bachelor of Science Degree with honors from Bob Jones University in Greenville, South Carolina, in 1977. In 1981, he received a Masters Degree in Business Administration from the Graduate School of Business Administration at Harvard University in Cambridge, Massachusetts.

8. From 1970-1973, Bott worked afternoons at station KCCV(AM), Independence, Missouri, as an announcer and program producer. At Bob Jones University, Bott worked at campus carrier-current station WBJU(AM) from 1974-1977 and was in charge of promotions, programming, and advertising. From 1977-1979, Bott was the General Manager of Media Management Associates, an advertising agency in South Carolina. For approximately a six-month period in 1981 and 1982, he served as the General Manager of station WFCV(AM), Fort Wayne, Indiana.

9. In 1982, Bott joined the Bott Broadcasting Company (BBC) as Vice President for Sales and Marketing. In 1984, he became Vice President of BBC and is now one of its directors. BBC has three directors. Its bylaws provide that the "property, affairs and business of the Corporation shall be managed by its Board of Directors, consisting of three persons." RRI Ex. 7.

10. BBC is the licensee of station KCCV(AM), licensed to Independence, Missouri. Bott Ex. 2; Tr. 29. BBC is also the licensee of station KQCV(AM), Oklahoma City, Oklahoma, station WFCV(AM), Fort Wayne, Indiana, and station KBCB(AM), Overland Park, Kansas.

11. Bott presently works on a full-time basis at BBC handling administrative matters for the firm and the radio station owned by and under its control. Bott intends to remain an officer of BBC and its associated companies. Tr. 55.

12. Bott is Vice President, a director, and 20% stockholder of Bott Communications, Inc. (BCI). Bott Ex. 2. There are three directors of BCI. Its bylaws provide that "the business and affairs of the Corporation shall be managed by or under the direction of the Board of Directors of the Corporation." RRI Ex. 8.

13. BCI is the licensee of station KSIV(AM), Clayton, Missouri. Bott Ex. 2; Tr. 28. It holds a construction permit for a new commercial FM radio station at Goodland, Kansas, and it holds a construction permit for a new FM broadcast station to serve Hastings, Nebraska.

14. AJB Broadcasting, Inc. (AJB) is 80% owned by BCI and 20% owned by Arla Bott Eicher, Bott's sister, giving Bott a 16% equity interest in AJB. Bott Ex. 2 On May 14, 1987, AJB was awarded a construction permit for a new FM radio station at Mt. Bullion, California.

15. Bott is Vice President and one of three directors of Victory Communications, Inc. (VCI). Bott Ex. 4. VCI is wholly-owned by BBC. Bott Ex. 2. VCI is the licensee of station WCRV(AM), Collierville, Tennessee. Finally, Bott is the 100% owner of a construction permit for a new FM station to serve Central Valley, California. Bott Ex. 2.

16. Thus, Bott presently holds all of the equity of one FM permitee (Central Valley). He has a 20% equity interest in one operating AM station (KSIV), and two FM permitees (Goodland and Hastings). He has a 16% equity interest in a fourth FM permitee (Mt. Bullion).

17. The following mileage distances between Bott's proposed Blackfoot, Idaho, facility and the other relevant communities, as shown on Bott's Exhibit E-1, are as follows:[1]

to Central Valley, California	856 km.
to Mt. Bullion, California	871 km.
to Goodland, Kansas	995 km.
to Overland Park, Kansas	1,564 km.
to Independence, Missouri	1,571 km.
to Clayton, Missouri	1,920 km.
to Oklahoma City, Oklahoma	1,532 km.
to Fort Wayne, Indiana	2,267 km.
to Collierville, Tennessee	2,134 km.

Radio Representatives, Inc.

18. Radio Representatives, Inc. is a corporation, the stock of which is owned by five individuals as follows:

	Shares	Percentages
Sherwood H. Patterson, II	1250	16 2/3
N. James Patterson, Jr.	1250	16 2/3
Sharon A. Patterson	1250	16 2/3
Myrlin C. Patterson	1250	16 2/3
G. Dawn Delgatty	1250	16 2/3

None of the Radio Representatives' stockholders proposes to be integrated into the management of the Blackfoot radio station.

19. Radio Representatives holds a construction permit for KGDP(AM), Orcutt, California. Orcutt is approximately 800 miles from Blackfoot, Idaho. RRI Ex. 1; Tr. 116. N. James Patterson, Jr., and Sharon Patterson jointly own 50% of the stock of New Life Enterprises, Inc., the licensee of KIRV(AM), Fresno, California. N. James Patterson, Jr. is also the President and the Director of New Life. Fresno is approximately 700 miles from Blackfoot, Idaho. RRI Ex. 1; Tr. 117. Finally, Radio Representatives' application for a new AM station at Eagle, Idaho, has been granted, as reported by amendment filed on May 6, 1988.

20. Radio Representatives will install emergency power generating equipment at its main studio and transmitter to permit uninterrupted service during power outages. RRI Ex. 1.

Clare Marie Ferguson

21. Ferguson is an individual applicant. She resides in Twin Falls, Idaho, outside the service contours of her proposed station. Ferguson Ex. 1. Ferguson will move to Blackfoot if her application is granted. Tr. 167.

22. Ferguson proposes to work at the station full-time, at least 40 hours per week, as its General Manager. Ferguson Ex. 2. She will be responsible for supervising all aspects of the station's operation, including programming, engineering, sales, and promotion. She will have ultimate responsibility for implementing the station's equal employment opportunity program, as well as responsibility for personnel decisions.

23. Ferguson has been issued a construction permit for an FM station in Baker, Oregon. Ferguson Ex. 3. The proposed Blackfoot station would be located approximately 295 miles from the Baker, Oregon, radio station. At the time of hearing, Ferguson's husband, David N. Capps, together with his minor children, owned all of the stock of KSRV, Inc., the licensee of stations KSRV-AM/FM, Ontario, Idaho, and KEZJ-AM/FM, Twin Falls, Idaho. On November 12, 1987, an application was filed requesting Commission consent for the assignment of the licenses of stations KEZJ-AM/FM to B & B Broadcasting, Inc.

24. Ferguson learned of the availability of the Blackfoot allocation from Mr. Capps, her husband, in the Spring of 1985, before they were married. Tr. 138. Prior to filing her application, Ferguson visited Blackfoot, possibly with Capps. Tr. 139-40. Ferguson subsequently retained legal counsel and an engineer, both of whom were already on retainer to her husband's stations. Tr. 140. Both her legal counsel and engineer were paid out of a joint account (i.e., with Ferguson and Capps both having legal control over the account), with checks being drawn by the office manager at station KEZJ-AM/FM. Tr. 141-44. From the time the first payments were made to her counsel and engineer, the money of both Capps and Ferguson was spent in the prosecution of her application. Tr. 147.

25. Capps made the appointment and initially visited their banker alone, when Ferguson and Capps were determining whether to finance the Baker, Oregon and/or Blackfoot, Idaho applications. Tr. 148. They decided to

use their jointly held personal assets (i.e, cash) to prosecute the Blackfoot application and construct the station. Tr. 156.

26. It was Mr. Capps who initially contacted the Bureau of Land Management in order to find a transmitter site. Tr. 145. When Ferguson visited her communications attorney in Washington, D.C., Capps accompanied her and participated in the discussions with counsel regarding the preparation of Ferguson's Blackfoot application. Tr. 144-45. Capps participated in selecting personnel for Ferguson's proposed Baker, Oregon, station. Tr. 165. The Baker station is being built by another engineer, John Kelly Carlson, under the supervision of Ferguson and Capps. Tr. 163-64. Mr. Carlson, who is presently the engineer at stations KEZJ-AM/FM, is also paid out of the Ferguson/Capps joint account. Tr. 179.

27. On May 30, 1985, shortly before they were married, Ferguson and Capps entered into an ante-nuptial agreement providing that the property owned by each as of that date, including Mr. Capps' ownership of KSRV, Inc. stock, would remain separate, unless one party makes a gift to the other party. Ferguson Ex. 4; Tr. 171, 175. The ante-nuptial agreement was created to keep separate everything owned prior to the marriage. Tr. 174. Idaho is a community property state. By operation of state law, assets acquired by either party during a marriage are considered jointly owned assets. Tr. 169.

28. If Ferguson's application is granted, Capps will move with her to Blackfoot and start a sales consulting business. Tr. 178, 185.

29. Ferguson was born in Washington, D.C. on March 11, 1951. In 1971, she received an Associate Degree in Retail Merchandising from Elizabeth Seton College in Yonkers, New York. She graduated from the University of Puget Sound in Tacoma, Washington, with a Bachelor of Science Degree in Business Administration in 1975.

30. In June 1981, Ferguson became employed by Capps Broadcast Group and KSRV,Inc. in Twin Falls, Idaho, as a sales associate. She still holds that position today.

31. During her first year with stations KEZJ-AM/FM, Ferguson served as a sales associate. Thereafter, she became involved in the development of the station's agricultural programming with attendant duties for the sales and promotion of this programming to the area farm community. She has been actively involved in the training of new sales personnel at the station beginning with basic orientation and including actual participation in field sales situations. Ferguson has held the senior sales position with her station for the past five years. Her experience includes creating sales copy and commercial announcements, designing and executing sales promotions, and the development and implementation of sports programming.

32. During her residence in Twin Falls, Ferguson has been a member of the Junior Club, a women's club providing service and financial assistance to community projects through fund-raising and promotional efforts. In 1982, Ferguson served as a member of the Board of Directors of this group.

33. Since 1981, Ferguson has been an Ambassador of the Twin Falls Chamber of Commerce. The Ambassador Program of the Chamber is responsible for welcoming new business to the community, conducting the annual membership drive, and hosting regular community social events for the Chamber of Commerce.

34. Ferguson is an active member of Network, an organization of business and professional women in Twin Falls, Idaho. She serves on the Board of Directors of Western Days, the only community-wide event held on an annual basis in Twin Falls. Since 1983, she has served as Director of Publicity for the Western Days celebration. Finally, Ferguson has served with the local United Way Campaign and the fight against cancer, concentrating her efforts primarily upon fund-raising. All of Ferguson's civic activities were in the Twin Falls area, outside of Ferguson's predicted 1MV/M service contour.

35. Ferguson intends to install an auxiliary power service so as to be able to provide continued service in the event of a power failure. Ferguson Ex. 10.

Comparative Coverage

36. The following table illustrates the areas and populations which each applicant proposed to cover, at night, from its originally specified site. Joint Ex. 1.

Nighttime Service

Area (Sq. Km.)[2]				Population		
	Bott	RRI	Ferguson	Bott	RRI	Ferguson
Total	16,607	22,326	16,667	162,392	203,620	162,392
Other existing services:						
0	48	0	18	0	0	0
1	32	198	21	0	0	0
2	72	7,052	81	0	4,791	0
3	2,369	288	2,365	5,612	0	5,612
4	509	420	531	1,373	0	1,373
5 or more	13,577	14,368	13,651	155,407	198,829	155,407

A new fourth aural service to approximately 420 persons would be provided by RRI during daytime hours. Otherwise, no other daytime service to underserved areas would be provided under any of the original proposals. Joint Ex. 1.

37. By *Order*, FCC 87M-3063 released November 25, 1987, an amendment to Ferguson's technical proposal was accepted. By *Order*, FCC 87M-3167 released December 7, 1987, an amendment to Bott's application was accepted. As a result of these amendments, all proposals would have the same predicted coverage as RRI's. Tr. 12.

III. CONCLUSIONS OF LAW

Richard P. Bott, II

38. Bott will receive 100% quantitative full-time integration credit for his proposal to work as the General Manager of his proposed station. This proposal is enhanced by his commitment to move to Blackfoot if awarded the construction permit, and by his broadcast experience.

39. Bott presently holds all of the equity of one FM permitee. He has a 20% equity interest in one operating AM station and two FM permitees, and he has a 16% equity interest in a fourth FM permitee. In addition, Bott is the Vice President and a director of BBC, a company which is the licensee of three AM stations and the parent of the licensee of a fourth AM station. Although Bott's

media interests are all distant from Blackfoot, he is associated as an owner or manager (or both) with eight radio stations around the country. These ownership and significant managerial interests require the assessment of a moderate diversification demerit against Bott.

Radio Representatives, Inc.

40. Radio Representatives receives no integration credit since none of its principals is proposed to work at the station.

41. Radio Representatives will receive a slight to moderate diversification demerit due to its ownership of an AM construction permit in Orcutt, California, its ownership of an AM construction permit in Eagle, Idaho, and the 50% ownership of N. James Patterson, Jr., and Sharon Patterson of the licensee of KIRV(AM), Fresno, California. The Orcutt and Fresno interests are distant, out-of-state interests; the Eagle, Idaho, interest is neither distant nor out-of-state.

42. Radio Representatives receives a slight preference for its proposal to utilize auxiliary power.

Clare Marie Ferguson

43. Legal title to KSRV, Inc., rests with David N. Capps and his minor children. Capps held that legal title prior to his marriage to Ferguson, and the parties' ante-nuptial agreement assures that, as against his wife, he will continue to hold that title in any action to terminate the marriage, and in any probate action upon the death of either Capps or his spouse. It is thus true, as Ferguson argues, that she has no claim, right, title, or interest in the stock of KSRV, Inc., owned by Capps and his children or in the broadcast assets of that company. However, the Commission's concern in applying its spousal attribution policy is not with legal title. Instead, in the diversification context, that concern is with control or influence:

> [The attribution rules] "define what constitutes a cognizable interest' for the purpose of applying the multiple ownership rules . . . . In that role, they represent the Commission's judgment regarding what ownership interest in or relation to a licensee will confer on its holder that degree of influence or control over the licensee and its facilities as should subject it to limitation by the multiple ownership rules." Attribution of Ownership, 97 FCC 2d 997, 999.

44. It is the general rule that the media interests of a spouse are to be considered and assessed against an applicant, due to the fact that in marriage, spouses have a clear "community of interest," and where they each own media properties they, at least in part, comprise a "collective voice" over the airwaves. *Alexander S. Klein*, 86 FCC 2d 423, 426 (1981). This policy dates back to 1976, where an applicant sought waiver of the multiple ownership rules restricting her and her husband from owning two stations in the same market following their marriage. *Lady Sarah McKinney Smith*, 59 FCC 2d 398 (1976). Despite the fact that the two licensees' wills both dictated that upon their deaths the stations would pass to persons other than the spouses, the Commission held that the ownership of both stations would violate the multiple ownership rules. The Commission noted that the purpose of its rules is to promote "maximum diversification of program and service viewpoints while at the same time encouraging maximum competition in broadcasting":

> "The reason that the Commission has consistently held that family relationships standing alone is insufficient to create a presumption of control is that most family relationships are typified by an independence of one member from another. Where there has been shown to be a sufficiently close relationship present between the family members, the Commission has found some degree of control present. *East Arkansas Broadcasters, Inc.*, FCC 60-1283, 20 RR 934 (1960). Similarly, there would appear to be far less independence involved and a far closer relationship involved in marriage than in other family relationships. We are unable to determine that such a relationship would result in the normally expected arms length competition in the operation of two FM stations." 59 FCC 2d at 401.

45. In *Alexander S. Klein*, 86 FCC 2d 423 (1981), where this policy was applied in the comparative licensing arena, the Commission stated:

> [W]e believe that the ownership interest of Mrs. Roberts and the proposed applicant and Mr. Roberts and Comcast create a potential for common control or less than arms length dealing between the two media interests. There is a clear community of interest between Mr. and Mrs. Roberts. We cannot assume that they would be neutral regarding conflicts arising between their respective media holdings. Nor can we be confident that Mr. and Mrs. Roberts would not constitute a collective "voice" contrary to the goals of the diversification policy. In reaching this conclusion, the Commission does not mean to suggest that Mrs. Roberts does not act fully in her own right or interest. We recognize that Mrs. Roberts has had an impressive career. However, the record discloses that Mr. and Mrs. Roberts maintain an extremely close relationship, have frequently participated together in civic affairs, and have a common financial interest. Moreover, Mr. Roberts has participated to some extent in the broadcast application. 86 FCC 2d 423, 426-27 (1981).

46. In *Ownership Attribution*, 58 RR 2d 604, at 620, the Commission had this to say about its approach to spousal attribution: "With respect to the specific situation in which a marital relationship is involved, we have previously determined that the interests held by one spouse are to be presumptively attributed to the other. Notwithstanding the nearly conclusive stature the Commission has acquitted this presumption in the past, we will henceforth permit this presumption to be rebutted, on a case-by-case basis, in appropriate circumstances."

47. Thus, although the presumption of common control or influence by virtue of the marital relationship is rebuttable, the ante-nuptial agreement in this case fails to rebut the presumption. In material part, the ante-nuptial agreement treats the question of who is to obtain outright ownership of Capps' broadcast stations following divorce or his death. It does not deal at all with the fact that during their continued marriage and his continued life,

they have a "commonality of interest" and a "collective voice over multiple broadcast outlets. In short, the agreement does not deal with the Commission's concerns.

48. The existence of a "collective voice" and interest already appears in this case. Capps has participated significantly in Ferguson's affairs, as detailed above, with respect to the Blackfoot application. Capps' media interests will be attributed to Ferguson. These in-state interests, along with her interest in the Baker, Oregon, facility, require the assessment of a moderate diversification demerit.

49. Idaho is a community property state. Property acquired during the marriage is presumptively community property. Idaho law does permit spouses to contract for separate property arrangements. However, the antenuptial agreement provides only for the separation of property acquired by the spouses before marriage as well as property acquired during the marriage by gift, bequest, devise, descent, and through separate proceeds from separate property acquired before the marriage. Ferguson Ex. 4, at pages 2, 3.

50. Ferguson stated that her only reason for entering into the agreement was because she "felt it was important to keep everything separate prior to the marriage." Tr. 174. The agreement does not provide for the separation of property acquired after the marriage unless it is acquired solely from one spouse's assets. Ferguson admits that she and Capps decided to use their jointly held personal assets *(i.e.,* cash) to prosecute the Blackfoot application and construct the station. Since they are now married and have used their joint assets to prosecute the Blackfoot application (and intend to do so to construct), it is clear that if Ferguson's application is granted, the Blackfoot station will be the community property of both Ferguson and Capps.

51. Integration credit is based upon the coincidence of legal responsibility for and actual participation in the station. However, spousal attribution for integration purposes has sometimes been permitted. *New Continental Broadcasting Co.*, 88 FCC 2d 830, at 838, where the spouses jointly owned 51% of the applicant corporation. In *Absolutely Great Radio, Inc.*, 104 FCC 2d 1 (1986), the Commission indicated that it would attribute, for integration purposes, the equity interest of a spousal co-partner where the marital partners were joint tenants and their mutually owned applicant entity is structured as a joint tenancy solely for estate planning purposes. This determination was stated to be based on "the survivorship attribute of joint tenancies, which is responsive to the estate planning motive.

52. In Idaho, husband and wife are equal partners in the community property, with no distinction between them. *Davenport v. Simons*, 189 P. 2d 90 (Idaho 1948); *Hansen v. Blevins*, 367 P. 2d 758 (Idaho 1962). Thus, such property is jointly owned, and the attribute of survivorship is an incidence of community property.

53. In this case, the "estate planning motive," and the response to it, are supplied by the operation of Idaho law rather than by the purely private actions of Ferguson and her spouse. These facts, however, do not defeat Ferguson's entitlement to have attributed to her for integration purposes her husband's interest in the Blackfoot application.

54. Nevertheless, there are reasons for not allowing the attribution of Capps' interest to Ferguson in this case. In order to limit spousal attribution for integration purposes to those instances where it is clear that the unintegrated spouse "is an owner in name only while the other will exercise complete control over the entire joint interest," that is to say, "the most obvious cases," the Commission in *Absolutely Great, supra*, stated the following:

> [W]e will attribute the interest of one spouse to the other for integration purposes where the spouses represent that only one of them is the intended actual owner, that the active spouse would exercise exclusive control and be the financial force behind the joint interest, and that the other spouse is given a totally derivative ownership interest as a joint tenant for estate planning purposes. Also, the inactive spouse cannot participate in the preparation of the application, cannot be proposed to participate in any station activities, and cannot assist in funding of the proposed station as a contributor, lender or loan guarantor.

55. Capps' action with respect to the Blackfoot application belie any claim that he has been or will be "an owner in name only." Capps originally informed Ferguson about the Blackfoot allocation. Prior to filing her application, Ferguson visited Blackfoot, possibly with her husband. Ferguson retained legal counsel and an engineer, both of whom were already retained by her husband with respect to his stations. Both her legal counsel and engineer were paid out of a joint account (i.e., with Ferguson and Capps both having legal control over the account), with checks being drawn by the office manager at stations KEZJ-AM/FM. From the time the first payments were made to her counsel and engineer, the money of both Ferguson and Capps was spent in the prosecution of her application. Capps made the appointment and initially visited their banker alone, when Ferguson and Capps were determining whether to finance the Baker, Oregon and/or Blackfoot, Idaho applications. They decided to use their jointly held personal assets *(i.e.,* cash) to prosecute the Blackfoot application and construct the station, and Ferguson certified her financial qualifications based upon their joint assets. It was Capps who initially contacted the Bureau of Land Management in order to find a transmitter site for Ferguson. When Ferguson visited her attorney, Capps accompanied her and participated in discussions regarding the preparation of Ferguson's Blackfoot application. Capps has also participated in selecting personnel for Ferguson's proposed Baker station. The Baker station is being built by another engineer, John Kelly Carlson, under the supervision of Ferguson and Capps. Mr. Carlson, who is presently the engineer at stations KEZJ-AM/FM, is also paid out of the Ferguson/Capps joint account. Capps will be considered a 50% unintegrated owner of Ferguson's Blackfoot station, and Ferguson will receive 50% full-time quantitative integration credit for her proposal to work at the station as its General Manager. This proposal is enhanced by Ferguson's female status, her plan to move to Blackfoot, and her past broadcast experience as a sales associate at KEZJ-AM/FM, Twin Falls, Idaho, since 1981.

Comparative Coverage

56. By post-designation amendments, Bott and Ferguson propose to serve the same areas and populations as RRI. In order to prevent impermissible comparative upgrading as a result of such amendments, the original proposals will be relied upon, where necessary, in a comparative

coverage analysis. *Women's Broadcasting Coalition, Inc.*, 59 RR 2d 730, 733 (1986); *Erwin O' Conner Broadcasting Co.*, 22 FCC 2d 140, 143 (1970). In the category of total population to be served, therefore, Bott and Ferguson will be held to the lower figure, 162,392, which is the population they would have covered from their original sites. Bott and Ferguson will be credited with the originally proposed nighttime third service of 0 and 6th service or higher to 155,407 persons. In the remaining nighttime categories, namely, first, second, fourth and fifth service, the present sites provide no coverage and, thus, may be relied upon without constituting comparative upgrading. In the daytime, RRI will be credited with providing a fourth service to 420 persons and Bott's and Ferguson's original proposal to provide no such service will be relied upon.

57. None of the applicants will provide service to underserved areas except RRI, whose proposal constitutes a third nighttime service to 4,791 persons and a fourth daytime service to 420. RRI is entitled to a slight preference for such service superiority. *Radio Jonesboro, Inc.*, 96 FCC 2d 1106, 1113 (Rev. Bd. 1984). In total population to be covered, RRI enjoys an advantage of more than 41,000. For this reason alone, it receives a slight preference. *Christian Broadcasting of the Midlands, Inc.*, 99 FCC 2d 578, 582-83 (Rev. Bd. 1984). Since RRI receives slight preferences for both total coverage and for service to underserved areas, it is entitled to a total comparative coverage preference on the order of slight-to-moderate.

58. In sum, for total coverage superiority and service to underserved areas, RRI is entitled to a slight-to-moderate comparative coverage preference over Bott and Ferguson.

ULTIMATE CONCLUSIONS

59. Each of the three applicants receives a diversification demerit. Radio Representatives' "slight-to-moderate" diversification demerit is of somewhat lesser significance than the "moderate" demerits assessed against both Bott and Ferguson.

60. Bott's enhanced 100% integration is far superior to Radio Representatives (0% integration). Radio Representatives' slight preference for its proposal to utilize auxiliary power, and its slight-to-moderate coverage advantage, leave it behind Bott, owing to Bott's decidedly superior integration proposal. And because Ferguson proposes substantial integration while Radio Representatives proposes none, Ferguson is second to Bott.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews the decision on its own motion in accordance with Section 1.276 of the Rules, [3] the application of Richard P. Bott, II IS GRANTED, and the applications of Radio Representatives, Inc., and Clare Marie Ferguson ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Edward Luton
Administrative Law Judge

FOOTNOTES

[1] The recently awarded Hastings, Nebraska, construction permit is not included; however, official notice is taken of the fact that Hastings is further from Blackfoot, Idaho, than is Goodland, Kansas.

[2] Areas rounded off to the nearest kilometer.

[3] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
the Application of

WESTERN UNION CORPORATION, Assignor	File Nos. 1982-DSE-AL-88(4) 1983-DSS-EXT-88 1984-DSS-ML-88 1985-DSS-ML-88 1986-DSS-ML-88 1987-DSS-ML-88

and

HUGHES COMMUNICATIONS
GALAXY, INC.,
Assignee

Application for Consent to Assignment
of Licenses

ERRATUM

Released: December 12, 1988

By the Common Carrier Bureau:

1. Paragraph 18 of Memorandum Opinion and Order, DA 88-1802 (released November 25, 1988) is corrected to read as follows:

"18. IT IS FURTHER ORDERED that Hughes Communications Galaxy, Inc.'s Application File No. 1983-DSS-EXT-88 IS GRANTED and authority to launch the Westar VI-S satellite IS EXTENDED to May 1990."

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-526

In re Applications of

WILLIAM M. PINER File No. BPH-860604ML

RO NITA BERNICE HAWES-SAUNDERS File No. BPH-860606MI

For Construction Permit for a new FM Station on Channel 221A in West Carrollton, Ohio

Appearances

Mark E. Fields, on behalf of William M. Piner; *Arthur V. Belendiuk*, on behalf of Vernon R. Baldwin; *Jonathan V. Cohen*, on behalf of Dayton Public Radio, Inc.; *Herber Miller*, on behalf of 2001 Communications, Inc.; *Richard Swift*, on behalf of West Carrollton Broadcasting Company; *Lawrence Bernard, Jr.*, on behalf of Whalen-Logan Broadcasting; *Gene Bechtel*, on behalf of Two Twenty-One A Broadcast, Inc.; *Richard Bodorff, Clifford M. Harrington, Lisa Rycus Mikalonis*, on behalf of Ro Nita Bernice Hawes-Saunders; *Christopher D. Imlay*, on behalf of HP & P Corporation; and *Robert A. Zauner*, on behalf of the Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK

Issued: December 6, 1988; Released: December 15, 1988

PRELIMINARY STATEMENT

1. This proceeding involves the mutually exclusive applications of William M. Piner (Piner) and Ro Nita Bernice Hawes-Saunders (Hawes-Saunders) for a new FM broadcast station to serve West Carrollton, Ohio. These applications, as well as eight additional applications[1] which have since been dismissed were designated for hearing by the Chief of the Audio Services Division in *Hearing Designation Order*, DA 87-1668 adopted November 13, 1987; released November 27, 1987 (HDO). The HDO specified the following issues for hearing:

> If a final environmental impact statement is issued with respect to applicant Dayton in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether that applicant's proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§1.1301-1319.
>
> To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicants would constitute a hazard to air navigation.
>
> To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

2. Issue 1 was resolved in Dayton Public Radio, Inc.'s (Dayton) favor by the acceptance of its December 24, 1987, Motion for Leave to Amend, which amendment rendered the issue moot. *Order*, FCC 88M-320, released February 8, 1988. Issue 2 was resolved in favor of Piner, Dayton, West Carrollton Broadcasting Company (WCBC) pursuant to summary decision. *Order*, FCC 88M- 097, released January 15, 1988 (Dayton); *Order*, FCC 88M-215, released January 29, 1988 (Piner); *Order*, FCC 88M-1307, released April 29, 1988 (WCBC). The HDO stated that the areas and populations to be served by the parties would be considered under the standard comparative issue. However, the parties resolved these points via stipulation. (Joint Ex. 1).

3. Hearing sessions were held during the period June 7 - 13, 1988. The record in this proceeding was closed on June 13, 1988. *Order* FCC 88M-1829, released June 15, 1988.

FINDINGS OF FACT
COMPARATIVE ISSUES

William M. Piner

Structure

4. Piner is an individual applicant (Piner Ex. 1).

INTEGRATION

5. Piner proposes to serve as the station's manager, working full time on a daily basis (at least 40 hours per week). He will establish business policies, hire and fire and supervise employees, and insure compliance with laws and with FCC rules. He will plan and supervise programs, and will participate personally in some (Piner Ex. 1).

6. He plans to continue serving as pastor of First Baptist Church on a part-time basis if his FM station is built. His work as pastor will be done on weekends and evenings (Piner Ex. 1). The church has associate ministers serving under Piner, to whom he delegates authority (Tr. 106). Piner conducts morning services and a Wednesday night prayer service (Tr. 137). He also ministers to members of the congregation personally, in evening appointments. These duties average about five hours per week (Tr. 137-138).

Local Residence / Civic Involvement

7. Piner resides at 321 Huron Avenue in Dayton, Ohio, which is within the 1 mV/m contour of the proposed station. He has lived at this address for over ten years (Piner Ex. 1).

8. From 1964 to 1968, Piner was a member of the Southern Christian Leadership Conference (SCLC). He was the president of the Dayton Chapter of the Southern Christian Leadership Conference from 1964 to 1965 (Piner Ex. 1; Tr. 106-107).

9. From 1965 to 1968, Piner was a member of the Advisory Board of the Montgomery County (OH) Commission, the county's governing body (Piner Ex. 2). Piner has not been a member of the Advisory Board since 1968 (Tr. 110).

10. From 1974 to 1976, Piner was lecturer for the Dayton Baptist Ministers Association (Piner Ex. 2) Since 1981, Piner has been a member of the Community Education Board of Dayton (Piner Ex. 2). From 1982 to 1985, Piner was a police chaplain for the Jefferson Township Police Department (Piner Ex. 2).

11. In 1986, Piner was elected a member of the Southwest Priority Board of the city of Dayton, but did not participate in Board activities (Tr. 111-112).

Minority and Female Ownership

12. Piner is a Black male (Piner Ex. 1).

Broadcast Experience

13. Piner served as the Assistant Manager of FM Educational station WCXL, Dayton, Ohio, from 1981 to 1982; as the Manager of WCXL from 1982 to 1985; and as the night manager for WQRP, West Carrollton, Ohio from 1985 to 1986 (Piner Ex. 4). During the period of Piner's involvement with WCXL, the station had three licensees. Initially, the licensee of WCXL was Broadcast Workshop, Inc. The license was subsequently transferred to an affiliated entity, South West Ohio Public Radio. Later, the station was sold to Dayton Public Radio, Inc. (Tr. 32, 44, 138). Piner was never a paid employee of WCXL (Tr. 32). He testified that it was a non-commercial station and that all of the personnel worked gratis (Tr. 32).

14. Piner had entered into an arrangement with South West Ohio Public Radio, licensee of WCXL, whereby he agreed to lease or rent 100 percent of the program time of WCXL, a non-profit station operating on a frequency reserved for education station (Tr. 39-40). South West Ohio Public Radio's successor licensee, Dayton Public Radio, Inc., also entered into the same agreement with Piner for programming (Tr. 44-45; Hawes-Saunders Ex. 4). This agreement was in the form of a letter (Hawes-Saunders Ex. 4). Piner paid a monthly fee to the station's licensee for the use of the station's facilities (Tr. 42).

15. Piner testified that, under his arrangement with the station licensee, he was responsible for providing the entire program schedule of WCXL (Tr. 48-49). Under his administration of the station, the basic program format of the station was "gospel music to the Christian community." (Tr. 134). In addition, WCXL carried programs from many churches in the Dayton area[2] (Tr. 85).

Auxiliary Power

16. Piner will install and maintain auxiliary power capability at the station studio and transmitter locations, to keep the station on the air in the event of power failure (Piner Ex. 5).

Diversification

17. Piner does not have any ownership interest in, or connection with, any broadcast station or other media of mass communication (Piner Ex. 3).

Ro Nita Bernice Hawes - Saunders

18. Hawes-Saunders has no interest in or connection with any medium of mass communication (Hawes-Saunders Ex. 1).

Integration

19. Hawes-Saunders proposes to be integrated into the day-to-day management of the West Carrollton station on a full-time basis (a minimum of 40 hours per week) as General Manager (Hawes-Saunders Ex. 1). As General Manager, Hawes-Saunders will have overall responsibility for supervision of all station employees, insuring the coordination of all departments at the station and securing the proper functioning of all station operations (Hawes-Saunders Ex. 1).

20. Hawes-Saunders is currently self-employed as a consultant (Tr. 366). As such, she does professional development training, workshops and seminars and communications consulting (Tr. 366). Her only consulting contract expired in July, 1988 (Tr. 366). Hawes-Saunders will discontinue any employment she may have to effectuate her integration proposal (Hawes-Saunders Ex. 1).

Local Residence and Civic Involvement

21. Hawes-Saunders currently resides within the predicted 1.0 mVm contour proposed in her application she has resided in the West Carrollton- Dayton area within that proposed primary (1.0 mVm) service contour continuously since 1951 except for two limited time periods: from 1969 to 1973, when she attended Denison University in Granville, Ohio; and, following college graduation, from 1973 to 1974, when she attended graduate school at Ohio State University in Columbus, Ohio (Hawes-Saunders Ex. 1, Pg. 1).

22. Hawes-Saunders has been a member of the City of Dayton Volunteers Advisory Council since the beginning of 1988 (Hawes-Saunders Ex. 1; Tr. 367). She has also been a member of the Black Cancer Awareness Advisory Committee Combined Health District of Montgomery County since the beginning of 1988. a task force which she was asked to join at the end of 1987 (Hawes-Saunders Ex. 1; Tr. 367-368). She has been a member of the Preparation Enrichment Program Committee (Program for Disadvantaged Youth) from 1987 to the present (Hawes-Saunders Ex. 1).

23. Hawes-Saunders has been a member of the Dayton Philharmonic Orchestra Encore Committee form 1986 to the present (Hawes-Saunders Ex. 1). The Encore Committee plans special events and activities to coincide with the orchestra season to further the goal of increasing ticket sales of the Philharmonic (Tr. 368). Hawes-Saunders has been a member of American Women in Radio and Television, Inc. (AWRT) from 1978 to the present, where she served as Dayton Chapter President form 1982 to 1984, and on the National Board of AWRT as Vice-President of Professional Development from 1985 to 1987. She is currently serving on the National Board as Vice-President of the North Central Area, which term began in 1987 and will end in 1989.

24. She was a member of the Dayton Chapter of the Society of Professional Journalists from 1982 to 1985, where she attended meetings, helped to plan programs, and participated in the programs as a panel moderator Hawes- Saunders Ex. 1; Tr. 368, 376). The Society sponsors monthly programs and helps develop the talents of new individuals in the journalism field (Tr. 368). Hawes-Saunders was a Charter Member of Black Women for Professional Developmer: from approximately 1980 to 1982, where she served as Chairman of the Professional Development Committee (Hawes-Saunders Ex. 1; Tr. 376). From 1976 to the present, she has been a member of the National Association of Real Estate Brokers, Inc., a professional association that is responsible for insuring adherence to the laws, rules and regulations of the real estate industry (Hawes-Saunders Ex. 1; Tr. 369). From 1976 to the present Hawes-Saunders has been a member of the Dayton Area Board of Realtors, Inc., another professional organization (Hawes-Saunders Ex. 1; Tr. 369). From 1980 to 1982, she was a member of The Wright State University Non-Traditional Employment Program Advisory Board (Hawes-Saunders Ex. 1).

25. Hawes-Saunders was a member of the Dayton Opera Association Board of Directors in 1981, the co-chairman of the United Negro College Fund Telethon in 1982, and she has been a member of the Dayton Urban League Board of Directors from 1981 to the present (Hawes-Saunders Ex. 1). She was a member of the Board of Directors of the Camp Fire Council of the Greater Dayton Area from 1981 to 1987, a member of the Board of Directors of The Senior Citizens of the Greater Dayton Area from 1983 to 1986, and she has been a Dayton Performing Arts Fund Volunteer from 1980 to the present (Hawes-Saunders Ex. 1). She was a member of the Greater Dayton Private Industry Council from approximately 1984 to 1986, and she has been a Greater Dayton Public Television Volunteer from 1982 to the present (Hawes-Saunders Ex. 1; Tr. 370).

26. Hawes-Saunders has been a member of the Dayton Philharmonic Women's Association from 1986 to the present. She has been a member of the Dayton Chapter of the Links, Inc. from 1987 to the present (Hawes-Saunders Ex. 1; Tr. 370). The Dayton Chapter of the Links, Inc. is part of national organization of predominantly Black women involved in community oriented civic activities (Hawes-Saunders Ex. 1). She has been a member of the Junior League of Dayton from 1983 to the present, and she served on a number of committees, and was involved in activities, of the Dayton Board of Education from approximately 1985 to 1987, as follows: Partners in Education, Telecommunications Committee, Facilities Task Force Committee, Community Education Councils, "How to Market Yourself" Workshop Facilitator, Superintendent's Roundtable Leadership Training, and Superintendent's Cabinet (Hawes-Saunders Ex. 1; Tr. 370). All of the foregoing civic activities were within Hawes-Saunders' proposed service area (Hawes-Saunders Ex. 1).

Minority and Female Ownership

27. Hawes-Saunders is a Black female (Hawes-Saunders Ex. 1).

Broadcast Experience

28. From September 1973 to May 1974, Hawes-Saunders was a Production Assistant at WOSU-TV, Columbus, Ohio as a graduate student intern Hawes-Saunders Ex. 1). From June 1974 to July 1976, she was employed at WDTN-TV, Dayton, Ohio as producer/host of various community affairs programs (Hawes-Saunders Ex. 1). From May 1976 to May 1981, she was employed at WDAO Radio, Dayton, Ohio as a Talk Show Host for a community affairs call-in talk program entitled "Backpage" (Hawes-Saunders Ex. 1). From July 1976 to December 1978, she was employed at WPTD-TV, Dayton, Ohio (public television) as an Executive Producer (Hawes-Saunders Ex. 1). From January 1979 to June 1980, Hawes-Saunders was employed at WPTD/WPTO, Dayton, Ohio as Community Affairs Director, Producer/Host; her responsibilities included the supervision of two professionals--the station's volunteer program coordinator and its public information officer--and a secretary (Hawes-Saunders Ex. 1; Tr. 371). From July 1980 to January 1982, she was employed at WPTD/WPTO, Dayton, Ohio as Director of Community Relations, a promotion from her community Affairs Director position which carried over her supervisory and other responsibilities in addition to increased responsibilities Hawes-Saunders Ex. 1; Tr. 372).

29. From February 1982 to July 1985, Hawes-Saunders was employed at the University of Dayton, Dayton, Ohio as Director of News Services, where her responsibilities included supervision of one full-time employee and a number of student employees (Hawes-Saunders Ex. 1). From July 1983 to July 1987, she produced and moderated a public service program entitled "Emphasis on Education" at WDAO Radio, Dayton, Ohio Hawes-Saunders Ex. 1). From August 1985 to July 1987, she was employed by the Dayton Public Schools as Supervisor of Marketing and Media Services; her responsibilities included supervision of two professionals, one secretary and two students Hawes-Saunders Ex. 1).

Auxiliary Power

30. Hawes-Saunders will install an auxiliary power system which will enable her proposed station to continue to broadcast in the event of a local power outage (Hawes-Saunders Ex. 2).

Diversification

31. Hawes-Saunders has no interest in or connection with any medium of mass communication (Hawes-Saunders Ex. 1, Pg. 4).

CONCLUSIONS OF LAW

32. Neither applicant has any attributable media interests.

33. *Piner.* Piner will be credited with 100 percent full-time integration. His part-time ministry activity will not interfere with his integration commitment. Although Hawes-Saunders claims that Piner's integration commitment is temporary, there is ample evidence in the record indicating that Piner's commitment is permanent.

34. Piner is a long-time resident of the proposed primary service area. He has been an active participant in community affairs, more so in the past than in the last ten years. He's been Police Chaplain from 1982 to 1985 and a member of the Community Education Book since 1981. His integration commitment is substantially enhanced for local residence and moderately enhanced for civic participation.

35. Piner is also entitled to full credit under the minority ownership criterion.

36. Piner has been involved in radio since 1981 as assistant manager and manager of an FM educational station. Although Piner has not been paid compensation for his involvement, he is entitled to full credit for broadcast experience for his providing the entire program schedule of WXCL.

37. *Hawes - Saunders*. Hawes-Saunders will be credited with 100 percent full-time integration credit.

38. Except for college and graduate school years, she has been a lifelong resident of the proposed primary service area. Hawes-Saunders has been active in civic endeavors since 1976. Her involvement has been extensive since 1981. Her integration proposal receives full credit for local residence and a substantial enchancement for civic participation.

39. Hawes-Saunders is also credited with 100 percent minority ownership and 100 percent female ownership.

40. Hawes-Saunders began working in radio in 1974 as an intern. From 1979 to 1982, she was involved in management level, supervisory radio broadcasting posts. From 1983 to 1987, she was a producer and moderator of a public service program on a Dayton radio station. Her proposal is substantially enhanced by her broadcast experience.

41. Both applicants propose to install an auxiliary power system.

ULTIMATE CONCLUSIONS

42. Both applicants have received equal credits for integration, local residence, minority ownership, broadcast experience and auxiliary power. Hawes- Saunders has received a 100 percent credit for female status and a weighter credit for civic participation. On a comparative basis Hawes-Saunders has the edge. The public interest would best be served by a grant of the Hawes-Saunders application.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken to the Commission by a party or the Commission reviews this Initial Decision on its own motion in accordance with Section 1.276 of the Rules, the application of Ro Nita Bernice Hawes-Saunders (File No. BPH-860606MI) for a construction permit for a new FM Station on Channel 221A in West Carrollton, Ohio IS GRANTED, and the application of William M. Piner (File No. BPH-860604ML) IS DENIED. [3]

FEDERAL COMMUNICATIONS COMMISSION

John M. Frysiak
Administrative Law Judge

FOOTNOTES

[1] The application of Alix C. Rey was dismissed for failure to prosecute. *Order*, FCC 88M-297, released February 5, 1988. The applications of Vernon R. Baldwin; Dayton Public Radio, Inc.; 2001 Communications, Inc.; Whalen-Logan Broadcasting; Two Twenty-One A Broadcast Inc.; and HP&P Corporation were dismissed by *Memorandum Opinion and Order*, FCC 88M-2436, released July 28, 1988. The application of West Carrollton Broadcasting Company was dismissed by *Memorandum Opinion and Order*, FCC 88M-3122, released September 22, 1988.

[2] Hawes-Saunders has alluded to a number of incidents which she perceives to be violations of Commission Rules, and, therefore, a reflection on Piner's management abilities. But the charge is speculative. There is no evidence that Piner operated under other than full control of the station licensee. Piner's use of the title president was innocuous and more indicative of his ineptness operating a computer rather than operating a radio station.

[3] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Commission Policy Regarding
Terrain Shielding in the Evaluation
of Television Translator, Television
Booster, and Low Power Television
Applications

MEMORANDUM OPINION AND ORDER

Adopted: October 27, 1988; Released: December 15, 1988

By the Commission:

1. The Commission has under consideration a Petition for Partial Reconsideration filed May 26, 1988, by the Association of Maximum Service Telecasters, Inc. and the National Association of Broadcasters (Petitioners) of the Commission action taken in a *Policy Statement*, 3 FCC Rcd 2664 (1988).

2. In this *Policy Statement*, the Commission established a limited waiver policy regarding the consideration of terrain shielding in the Low Power Television Service (LPTV).[1] We set forth general guidelines on when we would consider terrain shielding requests to waive the LPTV application acceptance standards and provided general guidance for the submission of such requests. To summarize, waivers must be secured where proposed LPTV facilities would be predicted, under these standards, to cause prohibited interference to authorized full-service television, television translator and low power television stations. Such requests must be supported by a terrain study showing that the proposed facility would not be likely to interfere at the protected contour of such stations because of the intervening terrain. Alternatively, a less rigorous terrain showing is acceptable when the licensee, permittee or applicant of a potentially affected station[2] assents to the waiver in a written statement attesting to its belief that terrain shielding would preclude objectionable interference. The *Policy Statement* did not propose standards for incorporating terrain shielding into regular application processing procedures. Rather, it provided for the submission of terrain profiles to be evaluated by the Commission staff on a case-by-case basis. Consideration of terrain shielding is limited to those applications that are not mutually exclusive with other applications, where mutual exclusivity is determined by the interference protection criteria in Section 74.707 of the Commission's Rules. Terrain shielding is not taken into account in deciding whether two applications are mutually exclusive. It is not considered when raised for the first time by applicants in petitions for reconsideration or applications for review of staff actions. Finally, LPTV permits and licenses issued pursuant to terrain waivers are expressly conditioned to remind licensees and permittees of their responsibility to eliminate any interference caused to those stations predicted to receive interference without terrain consideration.

3. While the Petitioners generally support our more flexible terrain policy and its safeguards against interference, they fault the *Policy Statement* for not disclosing specific methods to be used by the Commission staff in its evaluation of terrain studies. They acknowledge the difficulty in selecting standard methodology because of the wide variability of terrain effects on interference predictions. Nevertheless, they seek further clarification concerning methods, models and formulas that are used in staff evaluations. They contend that our case-by-case treatment of terrain, without standard methods, is haphazard and could possibly result in the erosion of the technical quality of television service. They suggest, therefore, that it is premature to implement our LPTV terrain policy until uniform prediction standards can be developed in a Rule Making proceeding.

4. We agree with the Petitioners that there is generally merit in having standards for predicting the effects of terrain on signal propagation, and the Commission has an ongoing effort in this regard. Uniform prediction standards would obviate the need for a case-by-case waiver policy and lessen the administrative impact of specialized staff evaluations. Nevertheless, we do not believe that the public interest would be served by further delaying any consideration of terrain shielding pending the completion of a possibly lengthy Rule Making proceeding. [3] The *Policy Statement* expressed our reasons for adopting and implementing a limited waiver policy. Our experience with application processing has convinced us that it is very difficult to authorize additional television translator or LPTV service in certain areas of the country without consideration of terrain shielding, particularly in parts of the Rocky Mountain states. Repeated attempts to file acceptable applications in some of these areas have failed. The expressed desire for additional television service and our mandate to provide for this service wherever possible fully justify our limited consideration of terrain shielding at this time.

5. We are confident that our terrain policy will not result in interference to existing television reception. The provisions in the *Policy Statement* and the secondary status of all stations in the LPTV service are ample safeguards against this. First, we have limited the scope of our terrain waiver policy and described in as much detail as possible guidelines for the submission of terrain waiver showings. Second, the approval of a waiver request at the acceptance stage of application processing means only that the application can be proposed for grant in a Commission Public Notice. Interested parties then have an opportunity to file a petition to deny the application, disputing the applicant's terrain waiver submission. The grant of an application with a waiver is not made until the issues and materials presented in such petitions are fully considered. Finally, as noted above, LPTV permits and licenses with terrain waivers are granted with the express condition that LPTV operators must eliminate any objectionable interference caused to the potentially affected stations.

6. Our case-by-case evaluation of the terrain waiver showings will not depend solely on the use of a single standard prediction method. It affords the administrative flexibility to select from among available prediction models one that applies to the topographic features in each case.[4] Our evaluation considers all information provided by the applicant, *e. g.*, letters of assent, terrain profiles and any related analysis and any additional in-

formation we may request of applicants such as topographic maps. Ultimately, the decision to grant an application involving a terrain waiver rests on engineering analysis, taking into account all pertinent information, including interference studies filed with any petitions to deny. The first step in the evaluation is a determination that an applicant's terrain submission includes a sufficient number of well-placed terrain profiles to enable analysis over the entire sector of the protected contour where interference is predicted, without terrain shielding. Applicants are directed to provide additional profiles deemed necessary for the evaluation. The nature of the profile analysis depends on the conditions depicted by the profile; for example, the height and slope of terrain obstructions and the distances between the proposed LPTV antenna site, another station's protected contour and the obstruction. In the least difficult cases, where the site is located on or near the base of a large mountain between it and the protected contour, determinations of signal blockage might be made by inspection of the terrain profile. The more difficult cases involve close inspection of the profile in order to select an applicable analytical model and to determine the relevant input parameters of the model. The output normally is either a predicted field strength at the protected contour or a terrain obstruction loss, from which this field strength can be calculated. In some cases, a second prediction method may be used to confirm the conclusion of the first. The analysis also will include a comparison of our findings and those in an applicant's terrain study and, at a later stage of processing, the findings in petitions to deny alleging predicted interference from the proposed facility. Our analysis will, of course, be part of the public record and available for scrutiny. Finally, most of the terrain waiver requests submitted in the June 1988 LPTV application filing window involve antenna site locations in those mountainous areas, where, prior to the establishment of the LPTV service, thousands of noninterfering television translator stations were authorized on the basis of similar engineering analysis. In view of these factors, we believe that our determination not to specify an evaluation method will not result in degraded television reception.

7. In addition, the Petitioners ask that our LPTV terrain shielding policy be modified in certain respects.[5] First, they suggest a two-step process to assist the Commission in developing a full record before granting waivers of the acceptance standards. They ask that LPTV applicants be required to give notice of their waiver requests to all potentially affected stations and, second, that our Public Notices identify applications for which waivers of the acceptance standards have been requested. We agree with the second suggestion and will identify these applications on our notices announcing acceptance and proposed grant. This should give adequate notice to parties interested in filing petitions to deny. However, we will not require LPTV applicants to notify potentially affected stations in advance of or concurrent with the filing of their applications. Such a requirement is unnecessary given our decision to identify terrain waiver applications in our Public Notices. We also believe that, generally, applicants will seek to strengthen their waiver showings by attempting to obtain the assent of potentially affected stations and, thus, give voluntary notice of their intentions. Also, we do not wish to impose an additional burden on all applicants who believe that a terrain waiver is necessary, since not all applications with waiver requests will fall under the limited scope of our policy and will not be considered; *i. e.*, applications that are mutually exclusive with other applications and those applications that meet our acceptance standards without the need to consider terrain shielding.

8. Second, the Petitioners take issue with our provision for a less rigorous terrain study in cases where assent has been obtained, contending that assent alone is not sufficient to demonstrate the prevention of interference to the viewers of the assenting station. The Petitioners ask that we require the more rigorous study (accurately depicted terrain profiles) whether or not assent has been obtained. We disagree and affirm our view that, generally, a potentially affected station's belief that interference would not be likely to occur should weigh sufficiently to eliminate the need for an elaborate terrain study. Where assent is obtained, the less rigorous study serves to demonstrate the general character of existing terrain conditions, indicating the presence of mountains or other natural terrain conditions between the proposed LPTV facility and the protected contour of the assenting station. We would view the licensee of a station predicted to receive interference as a highly interested party, concerned about the preservation of the quality of its signal. It would be in the self-interest of a station licensee to assess carefully the prospect of interference from a proposed LPTV facility before giving its concurrence that interference would not be likely to occur. In our view, this informed judgment of an interested party, with knowledge of local terrain conditions, should generally suffice as adequate support for the waiver. Under these circumstances, the additional burden involved in submitting the more rigorous terrain study is not justified. In any event, we note that our provisions pertaining to assent and less stringent terrain waiver study are policy guidelines which do not bind us from requiring, at our discretion, a more extensive terrain study where the facts warrant.

9. Finally, although requested by the Petitioners, we will not require disclosure or a certification by the LPTV applicant that payments have or have not been made to the assenting station. Broadcast stations may incur various expenses in deciding whether or not to give assent, particularly in evaluating the likelihood of objectionable interference. We will not second-guess a station's intentions in passing these expenses to the party seeking the assent. We view this as a private matter to be negotiated among the parties, and we will not review, nor require disclosure of the financial terms of assent agreements, if any. We do not believe that disclosure of payments is necessary to ensure that viewers are not adversely affected. We again emphasize that a broadcast station's assent in no way absolves LPTV licensees of their responsibility to eliminate any objectionable interference caused to the viewers of the assenting station. *See* Section 74.703 (b) of the Commission's Rules. In this regard, we note that a broadcast station's assent to an LPTV station's terrain proposal will not be dispositive of interference issues. The Commission, either on its own motion or through the complaint process, remains ready to examine each case to ensure that viewers will not be affected adversely by objectionable interference. Regardless of the terms of any private agreement, the Commission will enforce its interference rules. We note that our decision is limited to circumstances involving terrain shielding for a secondary service and does not sanction the concept of "negotiating" for interference rights in other contexts.

10. In summary, our *Policy Statement* adopted reasonable guidelines for the submission and evaluation of terrain-related waiver requests, which, we believe, are sufficient to insure against the interference concerns raised by the Petitioners. Therefore, except as noted, we are not persuaded by Petitioners' arguments that the changes requested in their petition would serve the public interest, and we affirm the provisions adopted in the *Policy Statement*.

11. Accordingly, IT IS ORDERED, That the Petition For Partial Reconsideration filed by the Association of Maximum Service Telecasters, Inc., and the National Association of Broadcasters, IS GRANTED insofar as Commission Notices of proposed LPTV grants will identify applications requesting waiver of the acceptance standards, and IS DENIED in all other respects.

12. IT IS FURTHER ORDERED, That copies of this Memorandum Opinion and Order shall be sent Certified Mail-Return Receipt Requested to the parties named herein.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] All references to "LPTV" include television translators and television boosters, unless otherwise specified.

[2] Potentially affected stations include authorized full-service television, low power television and television translator stations, and those proposed in earlier filed LPTV or translator applications that are cut-off from further competing applications. *See Policy Statement*, 3 FCC Rcd at 2665.

[3] Over the years, the Commission has engaged in studies of the effects of terrain irregularities on signal propagation; however, it has not reached the stage of commencing a Rule Making proceeding from which to establish terrain prediction standards.

[4] For example, the following references treat the effects of radio wave propagation over irregular terrain: Bullington, K. (1947), "Radio propagation at frequencies above 30 megacycles," Proc. IRE 35, p. 1122; Rice, P.L., A.G. Longley, K.A. Norton and A.P. Barsis (1967), "Transmission loss predictions for tropospheric communication circuits," NBS Tech. Note 101, Vols. I and II (revised); Longley, A.G. and P.L. Rice (1968), "Prediction of tropospheric radio transmission loss over irregular terrain--a Computer Method-1968," ESSA Tech. Report ERL 79 - ITS 67; Hufford, G.A., A.G. Longley and W.A. Kissick (1982), "A guide to the use of the ITS irregular terrain model in the area prediction mode," NTIA Report 82-100. In addition, Section 73.684 of the Commission's Rules describes a prediction method based on terrain roughness. Prediction methods found in other reference materials may also be used in the evaluation of terrain showings.

[5] The Petitioners submit that terrain shielding arguments should not be accepted for the first time in response to petitions to deny or informal objections because this practice would unjustifiably shift the "burden of proof" from the applicant requesting a terrain shielding waiver to the potentially affected station. All LPTV applications proposed for grant must either meet or seek waiver of the acceptance standards for interference protection. Therefore, the Petitioners evidently are referring to interference issues not covered by these standards, such as alleged interference beyond the standard protected signal contours. An LPTV applicant has the right, under Section 309(d)(1) of the Communications Act of 1934, as amended, to file an opposition rebutting the arguments raised in a petition to deny. An applicant should be permitted to introduce any argument necessary to defend the grantability of its application. In this context, terrain shielding arguments have never been disallowed, and we find no reason to do so now.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS SATELLITE CORPORATION — File No. I-S-P-88-001

Participation in INTELSAT's Planned Domestic Services.

MEMORANDUM OPINION AND ORDER

Adopted: November 3, 1988; Released: December 15, 1988

By the Commission:

1. Pan American Satellite (PAS) has filed an Application for Review of an order by the Chief of the Common Carrier Bureau denying its "Emergency Motion to Initiate Proceeding and to Seek Deferral" (Emergency Motion) filed November 9, 1987.[1] The Communications Satellite Corporation (Comsat) submitted comments in opposition to the Application for Review and PAS filed a response to Comsat's comments. PAS also filed a Motion for Expedition requesting Commission action on its Application for Review no later than December 9, 1987. Comsat filed opposing comments December 7, 1987. For the reasons stated below, we deny PAS's Application for Review and its Motion for Expedition.

BACKGROUND

2. In its November 9, 1987, Emergency Motion, PAS requested that the Commission: 1) initiate an expedited notice and comment proceeding to allow interested parties to participate in the development of the U.S. Government position on INTELSAT pricing methodology for Planned Domestic Service (PDS); and 2) take appropriate action to request deferral of the PDS pricing issues at the INTELSAT Board of Governors meeting to commence on December 10. The motion also asked the Commission to apply the *ex parte* rules in this matter.

3. The Common Carrier Bureau denied PAS's Emergency Motion. The Bureau concluded that neither the Communications Satellite Act of 1962 nor the Administrative Procedure Act required institution of the procedures PAS requested. It determined that these procedures would be inappropriate and undesirable from the standpoint of effective protection of U.S. interests within INTELSAT on PDS issues. The Bureau determined that existing procedures provide the public with ample opportunity to comment on matters coming before the Board of Governors. The Bureau pointed to the availability of non-confidential INTELSAT documents in the Commission's public reference room, quarterly public meetings at Comsat on matters before the Board of Governors, and the ability of parties to comment informally at any time on the formulation of U.S. positions and instructions concerning future Board meetings. It noted that PAS regularly filed comments on Board issues with the Commission, NTIA and the Department of State under these procedures. The Bureau also found that the introduction of the procedures PAS requested would hinder the instructional process and hamper the government's ability to protect and promote U.S. interests within INTELSAT. It explained that because the Board of Governors controls its own agenda and sets its own timing for consideration of matters before it, the U.S. government must be prepared under any circumstances to issue instructions to Comsat in a timely manner. The Bureau also rejected PAS's appeal for the application of the *ex parte* rules to the instructional process. The Bureau found that the rules "would unnecessarily restrict the interaction between Comsat and the government" and "would substitute the current flexible arrangement for an arms-length, adversarial-type relationship." With respect to deferral of the PDS pricing issue, the Bureau ruled it did not have sufficient information to determine whether such a request would be in the public interest.

4. In its Application for Review, PAS argues it is entitled to additional procedural safeguards under notions of basic fairness embodied in the Administrative Procedure Act (APA) and the Due Process Clause of the Fifth Amendment. According to it, the instructions the government issues to Comsat must be formulated pursuant to standard APA procedure. It argues that the instructions are not exempt under the APA's foreign affairs exception. PAS claims that existing procedures are inadequate because they do not: 1) allow interested parties to respond to the comments of others; 2) prevent unfair access to U.S. officials; and 3) assure that the instructing agencies base their decisions on a documentary record. PAS states it is not suggesting a rigid application of the Commission's *ex parte* rules. It claims it is seeking a means of injecting fairness into the PDS proceedings. Furthermore, PAS asserts that the Commission has failed to follow its own procedures for public participation in the instructional process.

5. Comsat argues that the Commission plays only an advisory role in the instructional process and therefore makes non-binding contributions that are not covered under the APA's Rule Making provisions. Even if the Commission's input could be classified as a rule, Comsat maintains that Commission oversight of its signatory functions falls within the APA's foreign affairs exception. It believes the application of Rule Making type procedures to the instructional process would deprive the government of the confidentiality and flexibility it needs to respond to INTELSAT. With regard to PAS's due process argument, Comsat alleges that PAS has failed to show it has a legitimate claim of entitlement to a constitutionally protected interest. Comsat disputes PAS's assertion that it has unfair access to government officials during the formulation of U.S. positions. Comsat states that, as U.S. Signatory to INTELSAT, it is required to consult with the instructional authorities on a continuing basis.

6. PAS replies that the instructional process is not covered under the APA's foreign affairs execption because the commercial function of INTELSAT in PDS pricing takes the issue outside the bounds of foreign affairs. It also argues that where issues of a purely commercial nature are involved, Comsat should be considered an interested party, subject to the same treatment as other international carriers. Finally, PAS states that although it had an op-

portunity to present its views to the three U.S. Government agencies and although it submitted a detailed report on PDS, it was not invited to "crucial" meetings between U.S. Government representatives and Comsat and therefore had no assurance that its views were taken into consideration.

DISCUSSION

7. The issues PAS has raised center around the process by which the U.S. Government oversees Comsat's role in INTELSAT pursuant to the Communications Satellite Act of 1962, 47 U.S.C. § 701 *et. seq*, (1987) (Satellite Act).[2] This process involves the formulation and issuance of instructions to Comsat consistent with the foreign policy, national and public interest of the United States. The Department of State, NTIA and the Commission jointly participate in the instructional process. [3] The President has delegated to the Department of State authority to sign instructions.

8. The Satellite Act does not require public hearings prior to issuance of instructions to Comsat. Instead, instructions are formulated and conveyed to Comsat in accordance with procedures established by the Commission and the Executive Branch in 1966 and supplemented in 1984. The procedures require the U.S. government to ". . . exercise its responsiblity to instruct the U.S. representative in an expeditious and, *ordinarily, non - public manner* " (emphasis added).[4] They permit the Commission to arrive at its determinations concerning instructions to Comsat by means of a public hearing where "appropriate and desirable."[5] They recognize, however, that at certain times, the Commission may need to reach these determinations in a "non-public manner."

9. Under this process, each agency individually monitors issues to be considered by the INTELSAT Board of Governors through review of INTELSAT documents and discussions with the U.S. Signatory (Comsat). Prior to a Board meeting, the agencies meet jointly with the Signatory to discuss matters on the Board's agenda, including options and strategies for the positions the United States will take at the meeting. If an issue on the Board's agenda is likely to affect U.S. interests or foreign policy, the three agencies consult with each other to arrive at a U.S. government consensus on the particular U.S. position required to satisfy that interest or policy requirement. This position is formulated into a set of specific written instructions given to Comsat prior to the Board meeting. Instructions normally are not given at meetings between the Signatory and government agencies. Rather, they are issued after discussion and achievement of a consensus by the three agencies. These instructions may be modified before or during the meeting, in writing or orally. Although some clarification of the instructions may be given to Comsat on an informal basis, the three agencies strive for full concurrence and agency clearance prior to making substantive modifications to any coordinated instructions.

10. Although non-public procedures are permissible (*see* paragraph 8, *supra)*, current Commission procedures nevertheless afford interested parties the opportunity to express their views on matters coming before the Board of Governors. Under these procedures, the Commission places non-confidential INTELSAT documents in the Commission's international public reference room.[6] Members of the public may comment at any time on the formulation of U.S. positions and/or instructions concerning future Board meetings. In drafting instructions, consideration is given to views of interested parties based on discussions with those parties and on any comments filed with the Commission. In connection with these procedures, Comsat holds quarterly meetings open to the public. These open meetings are held about 45 days prior to each Board of Governor's meeting. At these public meetings, Comsat presents the dates and agenda for the upcoming Board meeting as well as a debrief on the prior Board meeting. Both the written materials for the public meeting and a taped record are placed in the Commission's public reference room.

11. PAS filed comments prior to the December 1987 Board of Govenors meeting concerning the position the U.S. should take on INTELSAT PDS pricing policy. In addition, PAS held discussions with each of the three agencies concerning its views on PDS pricing. However, PAS asserts that the unique circumstances surrounding PDS render existing procedures inadequate. It states that since no U.S. points will be served by PDS, Comsat will not have to file tariffs, and interested parties will not be able to comment on INTELSAT pricing decisions. Therefore, PAS claims that certain procedural protections will not be available to these parties, *i. e.*, an opportunity to reply to others' comments, an assurance that one interested party will not have unfair access to decision making personnel, and confidence that the agencies will base their decision on a documentary record. PAS argues that such protections are "required" under notions of basic fairness implicit in due process and the APA.

12. We disagree with PAS that the APA and/or the Due Process Clause requires the Commission to initiate a formal public proceeding for the consideration of PDS pricing issues. Nothing presented in PAS's Application for Review persuades us to change the Bureau's conclusion that the requested procedures are neither legally required or desirable from the standpoint of effective protection of U.S. interests. Accordingly, we affirm the Bureau's decision and deny PAS's Application for Review.

A. Policy Considerations

13. At the outset, we emphasize that there are several reasons which make difficult the application of a formal Rule Making-type regime for the instructional process. First, the agencies involved are normally under severe time constraints when formulating and issuing instructions to Comsat. INTELSAT Executive Organ documents proposing actions to be considered by the Board of Governors often are not distributed until a few days or even hours before the scheduled Board meeting. Clearly, under these circumstances, there is not enough time to complete a formal notice and comment Rule Making proceeding. Second, even if there were sufficient time before a meeting for such a proceeding, documents generated by the Executive Organ typically qualify for confidential treatment under the Freedom of Information Act (FOIA). Interested parties may initiate a formal FOIA request for these documents. However, this process can be time consuming and Comsat is under no obligation to waive its rights to a claim of confidentiality under the statute. Third, despite these time constraints, the government must issue instructions to Comsat on a timely basis. If circumstances warrant, the government may instruct Comsat to seek Board deferral of a particular proposal in order to allow further consideration of the matter. How-

ever, there is no assurance that the Board will agree to a deferral. The U.S. Signatory only has a 25 percent vote on the Board. The Board is independent of U.S. regulatory jurisdiction, controls its own agenda and sets its own timing for consideration of matters before it. As a result, the U.S. must be prepared to address the issue on a substantive basis in case it does not achieve deferral. Otherwise, U.S. interests may not be protected. Finally, the U.S. government must have the flexibility to modify its instructions to the Signatory during the course of a Board meeting. As with many international fora, the Board seeks to make decisions by consensus. This process often requires Signatories to compromise intital positions. The U.S. could not effectively engage in this dynamic process if instructions had to be based on a documentary record and modified only after opportunity for further comment by interested parties.

14. We believe that the specific circumstances surrounding the PDS pricing issue exemplify why the application of a formal Rule Making-type regime to the instructional process would be problematic. The INTELSAT Board of Governors meeting in question was held December 10, 1987. The Board considered, among other issues, PDS prices for INTELSAT VI series transponders.[7] PAS filed its Emergency Motion to initiate a formal comment and reply proceeding on November 5, 1987. Comments from Comsat opposing the motion were filed November 18, 1987. PAS filed reply comments on November 20. The Bureau adopted its order denying PAS's motion November 25. The order was released November 30. In denying PAS's motion, the Bureau stated that PAS could avail itself of existing informal procedures for filing comments and that Commission staff would be available prior to the Board meeting to discuss PAS's views on the PDS pricing issue. The Bureau explained that it would be premature to instruct Comsat to seek deferral of the PDS issue since a document setting forth the Director General's PDS proposals had not yet been issued. That document became available to the government on November 30. On December 10, after reviewing the submission of the Director General and considering the views expressed by PAS in comments filed with the Commission and in followup discussions, the agencies issued instructions to Comsat. Comsat was, at that time, instructed to seek deferral of the PDS pricing issue for the INTLESAT VI's. Absent achieving a deferral, Comsat was instructed to seek a consensus for adoption of the sales and lease prices proposed by the United States at the September, 1987, Board meeting. The Board ultimately decided to adopt prices for certain services (hemi, zone and spot beams) and defer any decision on prices for global beam services. The prices adopted for spot beams were based upon a compromise between the prices the U.S. proposed and those of the Executive Organ.

15. We reject PAS's contention that the procedures it sought could have been implemented under those circumstances. In response to the Bureau's finding that severe time constraints argued against institution of a comment and reply proceeding, PAS asserts in its Application for Review that " . . . any timeliness concerns arise here out of Comsat's four-week delay in releasing pertinent INTELSAT documents, with this delay followed by an interval of 25 days before Bureau resolution of PAS's Emergency Motion." PAS's argument is without merit. First, it is unreasonable for PAS to hold Comsat responsible for PAS's decision to request initiation of a formal proceeding only one month before the beginning of the December Board of Governors meeting. The documents PAS requested were subject to claims of confidentiality under the FOIA. Under existing procedures, PAS could have filed a FOIA request with the Commission or either of the other two agencies showing good cause for the release of the documents despite their threshold confidential status. Instead, PAS chose to approach Comsat and to request that it relinquish its claim of confidentiality and voluntarily release the documents.[8] Neither can we fault the Bureau for the time it took in reaching a decision on PAS's motion. The Bureau's order denying PAS motion was adopted only five days after PAS filed its reply pleading to Comsat. Furthermore, PAS was orally informed of the decision before its release on November 30. In view of the difficult issues raised by PAS's Emergency Motion, we believe the Bureau acted in an expeditious manner.

16. We also reject PAS's contention that, absent deferral of the issue by the Board at the December meeting, Comsat should have been required to announce that it would be prohibited "from participating in PDS programs until the U.S. has had an opportunity . . . to states its views." Specifically, PAS would have the Commission bar Comsat from making any financial contributions to INTELSAT relating to the cost of PDS programs until it is determined that such contributions are in U.S. interests. However, this approach presents three problems. First, Comsat is already authorized to participate in the INTELSAT VI procurement program in its entirety and no separate authority is required for use of the INTELSAT VI satellites for PDS service.[9] Comsat's authority cannot be rescinded in whole or in part through the instructional process. Such action would require initiation of administrative procedures under the Communications Act. Second, as the U.S. Signatory to INTELSAT, Comsat is responsible for a portion of INTELSAT's costs.[10] Failure to pay any amount due within three months may result in suspension of Comsat's rights under the INTELSAT Agreement and Operating Agreement. If payment is not made within six months of suspension, Comsat may be deemed to have withdrawn from INTELSAT.[11] PAS has not pursuaded us that Comsat should be instructed to withhold any portion of its financial obligations to INTELSAT in view of these provisions. Finally, even if the Commission could rescind Comsat's existing INTELSAT VI authority without further administrative procedures, instructing Comsat to withhold any contributions relating to PDS would not have prevented the Board from adopting PDS prices at its December meeting. The Board would simply have decided the matter without U.S. input and U.S. interests would not have been protected.

B. APA and Due Process Considerations

17. Having determined that formal public proceedings would not be appropriate as a matter of policy, we now turn to the question of whether they are legally required under the APA or due process percepts.

18. Under the APA, notice and comment procedures are required only for substantive rules. 5 U.S.C. § 553. Even if the issuance of instructions to Comsat by the State Department, the Commission and NTIA were deemed to be substantive rules, which they are not,[12] notice and comment procedures would not be required because the instructions process explicitly relates to the "national interest and foreign policy of the United States." 47 U.S.C.

§ 721(a)(4). The APA specifically provides an exemption from notice and comment procedures such matters relating to a "military or foreign affairs function of the United States . . . ." 5 U.S.C. § 553(a).[13]

19. We also reject PAS's claim that the principles of fairness embodied in the due process component of the Equal Protection Clause of the Fifth Amendment are offended by the degree of access Comsat has in the instructional process to government officials. This argument is flawed in two aspects: 1) PAS has based its due process argument on the erroneous contention that Comsat is an "interested party" with respect to the PDS pricing issue; and 2) PAS has failed to present a due process claim under the requirements established by the courts.

20. Comsat is the U.S. Signatory to INTELSAT. As such, it is a member of the INTELSAT Board of Governors, which is responsible for the planning and operation of the global system. In order for the U.S. government to carry out its statutorily mandated oversight responsiblity of Comsat and promote U.S. interests before the Board, it is necessary for government officials to have a free exchange of views with the U.S. Signatory before and during the Board meetings. Of particular importance is the ability of the Commission and other agencies to discuss positions prior to the Board meeting and strategies for pursuing them. The procedures that have been established to formulate and convey instructions to Comsat clearly anticipate such a free exchange of views. However, this relationship would be fundamentally changed if Comsat were to be deemed a party in interest for any particular issue, as PAS proposed, and other parties were permitted to attend all meetings between the U.S. Signatory and government officials, or government officials were otherwise restricted in their conversations with Comsat.[14] We believe that the Signatory and government officials could no longer engage in the same free exchange of views that otherwise would be possible if its discussions are not held confidential as they now are under current procedures. The result would be that knowledge of U.S. positions and strategies would be public and compromised prior to Board meetings. This result would undermine the ability of the United States to protect its interests within INTELSAT.

21. We also find that PAS has failed to raise a proper due process claim. Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty"[15] or "property"[16] interests within the meaning of the due process Component of the Equal Protection Clause of the Fifth Amendment.[17] In analyzing a due process question, the first step is to identify the liberty or property interest entitled to due process protection.[18] It is the nature of the interest, not its weight that determines if the due process requirements apply.[19] Once an interest has been identified, the party seeking due process protection must show that government action has caused significant, "grievous" injury to its interest.[20] If a party has made these initial showings, the next step is to determine what process is due.[21] The courts require the government to give a party the opportunity to be heard at a meaningful time and in a meaningful manner before depriving it of a protected interest.[22] In evaluating the adequacy of available procedures, the courts look to the following factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirment would entail.[23]

22. PAS has not satisfied requirements for a valid due process claim. First, it fails to identify a particular liberty or property interest entitled to constitutional protection. PAS specifically states that it does not claim any expectation that PDS policies not affect its business. Instead, it argues, "the fact that Comsat is subject to Title II of the Communications Act . . . create[s] a reasonable expectation on the part of all persons affected by PDS decisions that Comsat, as an interested party, will not be treated differently from other interested parties."[24] This is not the kind of interest due process protects.[25] To come within due process, PAS must show that government action would endanger a liberty interest, such as the right to contract, or a property interest to which it has a legitimate claim of entitlement.[26] PAS's claim of unequal treatment does not rise to this standard. Moreover, even if PAS identified a particular interest subject to constitutional protection, its argument must fail since it does not even attempt to show that the denial of its Emergency Motion caused grievous injury to its interest. PAS did not show either that it had suffered any erroneous deprivation or that it had been deprived of an opportunity to be heard at a meaningful time in a meaningful manner. We conclude that PAS was given significant opportunity to be heard on the PDS issue. PAS submitted comments on the PDS pricing issue to the Commission, NTIA and the Department of State. In addition, it held discussions with each of the three agencies concerning its views on PDS pricing. PAS filed its comments and held these discussions prior to the issuance of instructions to Comsat. Finally, we note the strong governmental interest in the instruction process and the existing informal procedures.[27]

23. PAS argues that, because the instructions to Comsat are never made public, it has no guarantee that its views on PDS in fact are taken into consideration.[28] However, the procedures the three agencies established to consider comments by interested parties are intended to strike a balance between the utility of public input into the instructional process and the need for confidentiality in developing positions for the U.S. to be taken before an international organization.[29] Neither the instructions nor any meetings between the U.S. government and Comsat preceding the issuance of instructions are a matter of public record. Confidentiality is necessary to maintain the viability of the U.S. negotiating position before the Board of Governors. That position would be substantially undermined if U.S. government instructions to the Signatory, or meetings with the Signatory prior to the issuance of instructions, were public. Under these circumstances, we believe that existing procedures that have been established by the agencies (see footnote 3 *supra)* are adequate and give PAS and other interested parties a meaningful opportunity to make their views known and have them considered[30] on any particular issue.

CONCLUSION

24. We affirm the decision of the Common Carrier Bureau to dismiss PAS's Emergency Motion. The application of notice and comment procedures to the instructional process would be impractical and inappropriate. A formal Rule Making-type regime would severly hinder

government efforts to respond to the agenda set by the Board of Governors and would limit the ability of the government to protect and foster U.S. interests. Furthermore, existing procedures allow PAS to express its views to the Commission, NTIA and the Department of State on this and other matters considered by the Board. Neither the due process percepts nor the APA requires us to adopt additional procedures for public participation in the instructional process.

25. Accordingly, IT IS ORDERED that the Application for Review filed by Pan American Satellite IS DENIED.

26. IT IS FURTHER ORDERED that Pan American Satellite's Motion for Expedition IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Communications Satellite Corporation, DA 87-1720, File No. I-S-P-88-001 (released Nov. 30, 1987).

[2] This oversight process stems from Section 201(a)(4) of the Satellite Act, which directs the President to "exercise such supervision over relationships of the corporation with foreign governments or entities or with international bodies as may be appropriate to assure that such relationships shall be consistent with the national interest and foreign policy of the United States." Section 201(a)(3) which directs the President to "coordinate the activities of governmental agencies with responsibilities in the field of telecommunication so as to insure that there is full and effective compliance with the policies set forth in this Act." Commission involvement emanates out of the various responsibilities conferred upon it under Section 201(c) of the Satellite Act.

[3] Procedures for U.S. Government Instruction of the Communications Satellite Corporation in its Role as U.S. Representative to the Interim Communications Satellite Committee, 77 FCC 2d 564, 811 (1980); Memorandum of Understanding between the Federal Communications Commission, Department of State, National Telecommunications and Information Administration and the Communications Satellite Corporation, signed September 28, 1984. We disagree with Comsat's portrayal of the Commission as a mere advisor in the instructional process. Under the procedures established for the U.S. Government instruction of Comsat, it is clear that the Commission has a role equal to those of the Executive Branch authorities.

[4] Procedures for U.S. Government Instruction to Comsat, 77 FCC 2d at 812.

[5] *Id.*

[6] Not all relevant documents may be available for public inspection, since they may be subject to claims of confidentiality under the Freedom of Information Act (FOIA). Over the past several years, the Commission has been presented with the issue of the public availability of INTELSAT and INMARSAT documents. We have adopted a policy which broadens public access to INTELSAT and INMARSAT information. In doing so, however, we recognized that some of these materials may merit confidential status. FCC rules permit any person submitting information to the Commission to request non-disclosure of such materials consistent with provisions of FOIA. In accordance with directives contained in the Comsat Structure Order, 90 FCC 2d 1159, 1191 (1982), procedures have been established with respect to the dissemination of INTELSAT and INMARSAT documents. *See* Letter from Chief, Common Carrier Bureau to Lawrence M. DeVore (March 30, 1984). Comsat is required to submit certain INTELSAT and INMARSAT documents for inclusion in the Commission's rountinely available files. Other documents are designated as qualifying for "threshold confidentiality." Such records are disclosed only upon a showing of good cause. Members of the public have the right to initiate a formal request for these latter documents.

[7] This was not the first time PDS pricing issues have been considered by the Board of Governors. At the 65th Board meeting (BG-65) held in December, 1985, the Board adopted a plan to establish two categories of PDS on INTELSAT V series satellites and to set prices for these services. The United States did not support this decision because it did not believe that there was sufficient information to determine whether the prices that were established covered fully allocated costs. In June, 1986 at BG-67, the U.S. submitted through its Signatory a pricing study prepared by the Commission which provided a range of cost-based prices for INTELSAT V transponders. The U.S. requested the Board to review the study and reconsider its prior decision as to INTELSAT V PDS prices. The Board did not take further action at BG-67. At BG-69 in December, 1986, the Board adopted new PDS prices for the INTELSAT V series. However, the U.S. did not support this decision because it continued to believe that certain of the new prices were not properly based of the costs of providing the services. In September of 1987 at BG-73, the U.S. Signatory submitted proposed PDS prices for the INTELSAT VI series. The prices had prior review and approval from U.S. government agencies. This U.S. Signatory submission was intended to conform with the basic principle embodied in earlier U.S. submissions that prices be based on fully distributed costs. The Director General had previously submitted prices that were substantially lower than those proposed by the U.S. Signatory. The Board decided to defer further consideration until BG-74 in December 1987. The Board directed the Director General to make recommendations for an integrated pricing plan for PDS capacity, taking into consideration the cost analysis and pricing proposals presented in his previous submission and that of the United States.

[8] Comsat did this on its own volition. Letter from Linda Wellstein, General Attorney, Communications Satellite Corporation, to Phillip L. Spector, Attorney for Pan American Satellite, dated October 26, 1987.

[9] Communications Satellite Corporation (File No. CSS-82-001-P) FCC 84-236 (released May 25, 1984).

[10] *See* Article 4(a) Operating Agreement Relating to the International Telecommunications Satellites Organization, TIAS 7532 (August 20, 1971). PAS disagrees with the Bureau's statement that, Comsat, as U.S. Signatory to INTELSAT, is required under the INTELSAT Agreements to contribute its share to INTELSAT programs undertaken consistent with the Agreements and is not permitted to withhold part of its payment simply because it or a U.S. party is dissatisfied with terms or conditions of a service the Board of Governors has approved. The Bureau's position, however, is consistent with the position we have taken since 1980, when we authorized Comsat's participation in the procurement of INTELSAT satellites. Communications Satellite Corporation, 82 FCC 2d 377, 380 (1980) (INTELSAT V system); Communications Satellite Corporation, File No. CSS-82-001-P at para. 3 (released May 25, 1984) (INTELSAT VI system). It has been recognized that the U.S. does not have effective control over INTELSAT investment decisions since Comsat controls only about 25 percent of the vote of the INTELSAT Board of

Governors, which is responsible for making investment decisions. If Comsat cannot convince other members to withhold support for new or additional investment in an INTELSAT program, it is committed under the INTELSAT Operating Agreement to its pro-rata share of the costs of the program. As a result, the Commission's flexibility in acting upon a Comsat application is limited by the fact that once the INTELSAT organization has committed to a program, with or without Comsat's support, Comsat is also committed to its pro-rata share of the costs of the program. However, we have the option to disapprove one or more of Comsat's applications, disallow part of Comsat's investment from its rate base or to order a change in the methods of accounting for the expenditures should the public interest so require. 82 FCC 2d at 385.

[11] INTELSAT Agreement, Article XVI(c).

[12] The issuance of instructions by the State Department, the Commission and NTIA to Comsat for its participation in an international conference would appear to fall outside the APA definition of agency action. 5 U.S.C. § 551(13). *Cf. FCC v. ITT World Communications, Inc.*, 466 U.S. 463 (1984) (FCC participation in the Consultative Process relating to international telecommunications issues was not "subject to the Commission's unilateral control" and therefore was not an agency meeting under the Government in the Sunshine Act). Even if deemed to be a rule, the instructions are more in the nature of a policy statement not subject to notice and comment procedures, 5 U.S.C. § 553(b), than a substantive rule. *See American Hospital Ass' n v. Bowen*, 834 F. 2d 1037, 1046 (D.C. Cir. 1987) (a policy statement "does not establish a 'binding norm'" and is "not finally determinative of the issues or rights to which it is addressed," while a substantive rule "'establishes a standard of conduct which has the force of law' in subseqent proceedings). The instructions constitute only initial U.S. negotiating positions and leave the agencies involved freedom to change direction in policy as matters unfold before the Board of Governors.

[13] A similar exemption exists under the Commission's *ex parte* rules. 47 C.F.R. § 1.1204(b)(4). *See also American Ass' n of Exporters and Importers - Textile and Apparel Group v. U. S.*, 751 F. 2d 1239, 1249-50 (Fed. Cir. 1985); *WBEN, Inc. v. U. S.*, 396 F. 2d 601, 616 (D.C. Cir.), *cert. denied*, 393 U.S. 914 (1968).

[14] PAS orginally requested the Bureau to apply the *ex parte* rules to Comsat on the PDS issue. In its Application for Review of the Bureau's order, however, PAS stated that it is not seeking a rigid application of the *ex parte* rules but rather some assurance that interested parties other than Comsat will have equivalent access to government policymakers at critical decision points. PAS is not altogether clear what it means by "equivalent access." It suggests in its reply comments that it should have been invited to the crucial meetings between the U.S. government representatives and Comsat prior to the December Board of Governors meeting. If PAS simply means that government officials should make themselves available to hear PAS's views, then the record is clear that PAS was given this opportunity. However, we disagree with PAS if its position is that due process requires that it be afforded the opportunity to be present at all meetings between U.S. government officials and Comsat, or that communications between Comsat and those officials otherwise be restricted on the theory that Comsat must be treated as an interested party. As to its *ex parte* concerns we note that the exemption for foreign affairs matters applies here. 47 C.F.R. § 1.1204(b)(4), *see also* 47 C.F.R. § 1.1204(b)(1) (presentations exempted by Commission's Rules, here by the INTELSAT instructional procedures).

[15] According to the Supreme Court, the concept of "liberty" encompasses the right of the individual to contract, to engage in the common occupations of life, to acquire useful knowledge, and generally to enjoy those privileges "long recognized essential to the orderly pursuit of happiness by free men." Board of Regents v. Roth, 408 U.S. 564, 572 (1972) (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

[16] A property interest is any interest a person has acquired in specific benefits. In order to trigger due process, a person must have more than an abstract need or desire for it. A person must have a legitimate claim of entitlement created and defined by an independent source, such as state or federal law. Board of Regents v. Roth, 408 U.S. at 577.

[17] Mathews v. Eldridge, 424 U.S. 319, 332 (1976).

[18] Brock v. Roadway Express, Inc., U.S., 107 S.Ct 1740, 1746 (1987); Cleveland Board of Education v. Loudermill, 470 U.S. 532, 538-539 (1985); Board of Regents v. Roth, 408 U.S. 564, 576-578 (1972); and Perry v. Sindermann, 408 U.S. 593, 599 (1972).

[19] Board of Regents v. Roth, 408 U.S. at 571; Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

[20] *See* Morrissey v. Brewer, 408 U.S. at 481.

[21] Morrissey v. Brewer, 408 U.S. at 481. *See also* Brock v. Roadway Express, *supra* note 24. The courts are in agreement that no single model of procedural fairness is dictated by the due process clause. *See e. g.*, Kremer v. Chemical Construction Corp., 456 U.S. 461, 483, *reh' g denied*, 458 U.S. 1133 (1982); Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961).

[22] Mathews v. Eldridge, 424 U.S. at 333.

[23] Brock v. Roadway Express, 107 S.Ct at 1747; Mathews v. Eldridge, 424 U.S. at 335. *See also* Old Dominion Dairy Products v. Secretary of Defense, 631 F.2d 953, 967 (D.C. Cir. 1980).

[24] Reply of Pan American Satellite, File No. I-S-P-88-001, at 10.

[25] *Cf. Multi - State Communications, Inc. v. FCC*, 728 F. 2d 1519 (1984) (no due process violation where Congressional action led to Commission grant of one of two competing applications without a comparative hearing).

[26] See supra notes 21 and 22.

[27] *See* paragraphs 13-16 *supra*.

[28] PAS also complains that not all relevant INTELSAT documents available to Comsat and the government are available to the public. However, as discussed *supra* note 4, predecisional Board of Governors documents may be subject to claims of confidentiality under the FOIA, and Commission rules afford PAS if it files a FOIA request, the opportunity to demonstrate that the disclosure is required in the public interest.

[29] PAS claims that we have violated our own procedures by failing to issue public notices before certain INTELSAT Board of Governors meetings. PAS is correct that the Commission has not issued a public notice prior to each INTELSAT Board meeting. Although we may have failed inadvertently to release these notices on a regular basis, we did, however, issue a public notice prior to the December Board meeting. Since PAS has provided comments in every instance when the Board has considered PDS pricing issues, it was not prejudiced in those cases when public notices were not issued. *See* Conner v. U.S. Civil Service Commission, 721 F.2d 1054, 1056-57 (6th Cir. 1983).

[30] In its role as one of the agencies developing positions for the U.S., the Commission considers all relevant views before it.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of the Part 95,
Subpart E, Technical Regulations
in the Personal Radio Services Rules.

ERRATUM

Released: December 14, 1988

1. On July 26, 1988, the Commission adopted an *Order*, 3 FCC Rcd 5032 (1988), in this matter rewriting the technical regulations of the Personal Radio Services Rules contained in Subpart E of Part 95, 47 C.F.R. §§ 95.601-95.669. The Personal Radio Services include the General Mobile Radio Service (GMRS), the Radio Control Radio Service (R/C), and the Citizens Band Radio Service (CB).

2. In the rules that were adopted, one frequency was inadvertently omitted from the listing of frequencies in paragraph (a) of Section 95.623. The frequency 75.79 MHz should be inserted between 75.77 MHz and 75.81 MHz in this paragraph.

3. Paragraph (a) of Section 95.623, 47 C.F.R. § 95.623(a), is hereby amended to correct this error. This action is effective upon public notice of the correction appearing in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re Application of

MOBILECOMM OF ALABAMA, INC. File No. 27056-CD-TC-88

Consent to Transfer of Control of PLMS stations KIF650, KRS687, KRS664, and KTS206 from Mobile Communications Corporation of America to BellSouth Corporation

RADIO & ELECTRONICS SERVICE CO. File No. 27114-CD-TC-88

Consent to Transfer of Control of PLMS stations KLF639, KIY593, KLF640, KWB455, and KLF649 from Mobile Communications Corporation of America to BellSouth Corporation

MEMORANDUM OPINION AND ORDER

Adopted: December 5, 1988; Released: December 15, 1988

By the Deputy Chief, Common Carrier Bureau:

1. American Mobilphone Paging, Inc. (American) has filed a petition to Dismiss or Deny (Petition) the captioned application to transfer control of Public Land Mobile Service (PLMS) Stations KIF650, KR687, KRS664, KTS206, KLF639, KIY593, KWB455, KLF640 and KIF649 from Mobile Communications Corporation of American (MCCA) to BellSouth Corporation (BellSouth). BellSouth filed an Opposition to the Petition and American filed a Motion for Extension of Time to Reply (Motion). BellSouth and MCCA filed an Opposition to the Motion. American received a one-week extension to file its Reply[1] and in response filed a Petition for Reformation of Partial Denial of Extension of Time and Contingent Motion for Two-Day Extension of Time, which we denied.[2] On September 16, 1988, BellSouth and MCCA filed a Motion For Leave To File Attached Motion of United States for a Waiver of Section IID of the Modification of Final Judgment to Permit the Bell Operating Companies to Provide MultiLATA Paging Services (MultiLATA Motion). The Motion was unopposed. We grant the Application for Transfer of Control for the reasons stated below.

BACKGROUND

2. American is a nonwireline, one-way paging and conventional two-way mobile telephone service provider in and around the Gulf of Mexico with its center of operations in Mobile, Alabama. On February 19, 1988, BellSouth and MCCA entered into a merger agreement whereby MCCA proposed to transfer control of various paging, two-way, mobile communications and microwave authorizations to BellSouth. During May, June and July of 1988, MCCA and its subsidiaries submitted applications seeking authorization for the transfer of control of the relevant facilities. Four hundred thirty-two (432) authorizations are involved in the merger, one hundred eighty-four (184) of which involve *pro forma* assignments and transfers. On August 8, 1988, American filed a Petition to Dismiss or Deny, challenging the transfer of nine (9) public land mobile frequencies in and around Mobile, Alabama.

CONTENTIONS

3. In its Petition, American contends that BellSouth's acquisition of the above-captioned MCCA subsidiaries would be anticompetitive and contrary to the public interest. American argues that Section 309(a) of the Communications Act requires that we consider the anticompetitive questions presented by the MCCA-BellSouth applications as part of our public interest evaluation in accord with *United States v. FCC*, 652 F.2d 72, 88 (D.C. Cir. 1980) (en banc), and *Mansfield Journal Co. (FM) v. FCC*, 180 F.2d 28, 34 (D.C. Cir. 1950). [3] American further argues that the anticompetitive effects of the proposed merger and acquisition should be measured by the product and geographic markets in which BellSouth, MCCA, and American now compete. American contends that, according to these standards, BellSouth's acquisition of the MCCA subsidiaries will give it "monopoly power over one-way paging services and common-carrier conventional two-way radiotelephone service along the Gulf Coast area." Common-carrier paging accounts for about 80% of American's gross revenues across its entire service area.[4] American contends that both MCCA and American now provide both conventional two-way service and common-carrier one-way paing service using two-way facilities. BellSouth has indicated that it will continue MCCA's paging service on those frequencies and thus, American further contends that any consideration of anticompetitive conduct in the common-carrier paging services product market must also consider the conventional two-way market as well. American argues that the four (4) Gulf Coast LATAs for which BellSouth seeks a line-of-business waiver from the Justice Department[5] and in which American, MCCA, and BellSouth now compete, constitute the relevant geographic markets. American contends that the Justice Department's Merger Guidelines[6] classify BellSouth's proposed acquisition of MCCA as a horizontal merger, thus requiring the computation of the Herfindahl-Hirschman Index (HHI). American, in its application of the Merger Guidelines indicates that the market's HHI for common-carrier paging operations will increase from 3286 to 4968 and give BellSouth a 58% market share in the competitive one-way paging market. American also argues that extremely high barriers to entry in the relevant market due to scarcity of available common-carrier paging and two-way mobile frequencies increases the liklihood of monopoly power by BellSouth. American notes that state regulation serves as a second, independent barrier to entry since Alabama has repeatedly denied applications for certification from other FCC-licensed carriers.

4. Further, American contends that BellSouth's acquisition of MCCA will give it significant technological and marketing advantages which will "distort the relative competitive strengths in the relevant markets." American argues that if BellSouth completes its acquisition of MCCA along the Gulf Coast it will be the local exchange telephone company, obtain monopoly power in common-carrier one-way paging, and in the Mobile LATA be one of two cellular telephone licensees. It will also possess "virtually unlimited financial resources, the "Bell" name recognition and service reputation among customers, and the ability to cross-market its various services." Technologically, American argues, BellSouth would have the ability to co-locate paging operations control equipment with its telephone switching centers which would permit former MCCA paging operations to be integrated with BellSouth's monopoly local exchange facilities and receive repair and maintenance services not available to American or other non-affiliated competitors. In addition, American contends that BellSouth's procompetitive offer to hold MCCA as a separate subsidiary from its operating telephone companies "falls far short of curbing the monopoly power which would result if its two subisidiaries (MCCA and South Central Bell) collectively had 58% of a paging market with high barriers to entry." In addition, American alleges that BellSouth's predatory and unlawful conduct with regard to its exclusive paging sales agent illustrates the potential for abuse of monopoly power over common carrier mobile radio services.[7] Finally, American contends that it has documented that BellSouth's acquisition of MCCA will produce anticompetitive effects along the Gulf Coast and that the extent of anticompetitive effects is a factual question requiring an evidentiary hearing as required by Section 309 of the Communications Act.

5. In its Opposition to the Petition, BellSouth contends that American's petition fails to demonstrate that grant of the captioned applications would be inconsistent with the public interest. BellSouth argues that in the Gulf of Mexico area, American, by its own admission, has the largest market share in the Mobile LATA, the only market in which specific concentration figures are alleged.[8] BellSouth maintains that the Department of Justice has precleared the transaction by way of the Hart-Scott-Rodino premerger review process, and the Commission has already considered and rejected generalized claims that allowing a local exchange company to acquire a greater market share is inherently anticompetitive. *Paging Systems - DPLMRS*, 89 FCC 2d 1337, 1345 (1982). Additionally, BellSouth contends that American mischaracterized the legal standard with regard to Section 309 of the Communications Act. BellSouth argues that the proper focus of the Commission's review of the instant application is on the transferee (BellSouth) and its qualifications. BellSouth cites *MG - TV Broadcasting Co. v. FCC*, 408 F.2d 1257, 1264 (D.C. Cir. 1968), where the Court of Appeals, interpreting Section 310 (d) of the Communications Act, has held that the question to be considered is "whether the proposed assignee possesses the minimum qualifications consistent with the 'public interest, convenience and necessity.'" BellSouth further argues that American has failed to demonstrate any public harm and focuses only on anticipated private harm. In response to American's anticompetitive claims, BellSouth notes that American's contentions raise no claims with regard to BellSouth's basic qualifications. Moreover, BellSouth states that American's claims of purported marketing and technological advantages pre-date the transfer applications and have not interfered with American's ability to capture, by its own admission, at least 40% of the common carrier paging market in Mobile.

6. BellSouth also contends that the proposed acquisition does not violate the Department of Justice's Merger Guidelines.[9] BellSouth states that the Justice Department, in connection with the premerger notification and waiting period requirements of the Hart-Scott-Rodino (HSR) Antitrust Improvements Act of 1976, carefully examined the competitive consequences of the proposed acquisition and declined to take any action to either enjoin or impose conditions on the merger. Further, BellSouth argues that American's market share and geographic analysis conflicts with Commission precedent and that there are no significant barriers to competitive entry in that there are 26 common carrier frequencies in the 900 MHz band available as common channels in the Mobile and Pensacola LATAs and other states in the Gulf area have no entry regulation of radio common carriers. Finally, BellSouth, in response to American's contentions regarding alleged prior predatory conduct imputed to BellSouth, argues that (1) these cases demonstrate sufficient safeguards against any attempt at improper behavior and (2) with or without MCCA's facilities, BellSouth will have no monopoly power upon which to base any predatory practices and the lack of substantial barriers to competitive entry would make any attempt at such pricing futile. Such allegations, BellSouth argues are misplaced and speculative.

DISCUSSION

7. Section 310(d) of the Communication Act provides, in pertinent part, that:

> No construction permit or station license, or any rights there-under, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

The proper focus of our review of the captioned applications is on the transferee, BellSouth, and its qualifications. The Court of Appeals, interpreting Section 310(d), *supra*, has held that the question to be considered is "whether the proposed assignee possesses the minimum qualifications consistent with the 'public interest, convenience and necessity.'" *MG - TV Broadcasting Co. v. FCC*, *supra*. In considering the antitrust issues raised by transfer of ownership applications, the Commission's obligation is to "perceive the danger areas," and decide whether "the public interest is best served by allowing the merger." *Florida East Coast Ry. Co. v. United States*, 259 F. Supp.993, 1002 (M.D. Fla.), *affirmed, per curiam*, 386 U.S.

544 (1967). *In United States v. FCC, supra*, petitioners argued that if a proposed entry to a market would appear to violate the Clayton Act, the FCC must reject the proposal, no matter how important other public interest factors might be. The Court disagreed stating that: "[t]he Sherman and Clayton Acts assume that the public interest is served by competition, in and of itself. Under the statutory fabric of regulation and of the Communications Act however, the FCC is required to decide where the public interest lies, and competition is but one element of a determination of the public interest." As a result, the Court affirmed that the Commission's decision not to hold an evidentiary hearing on the anticompetitive claims was reasonable.

8. After a review of the record in this case, we find, in accord with *United States v. FCC, supra*, that American has failed to establish that grant of the captioned transfer of control applications would be inconsistent with the public interest or would require an evidentiary hearing. We agree with BellSouth in its assessment that no challenge to its qualifications as transferee has been made by American. In addition, we find that the proposed acquisition does not violate the Department of Justice's Merger Guidelines nor does it raise substantial anticompetitive concerns. We find that American fails to demonstrate any public harm and focuses its petition solely on anticipated private harm. As to American's allegations of the premerger and postmerger HHI for the paging market in Mobile, Alabama and its perception of regulatory barriers to entry by radio common carriers in Alabama, the Justice Department carefully reviewed the competitive consequences of the proposed MCCA acquisition with respect to the paging and conventional mobile markets (including, but not limited to, the Mobile, Alabama and other Gulf Coast markets) and declined to take any action to enjoin the merger. We concur with the Justice Department's analysis and also find that American has not sufficiently shown evidence of regulatory barriers in the geographic market area. With regard to American's contentions regarding market share, we have specifically found that "the current number of pagers is not a proper measure of market share in light of the significant increase in the availability of paging frequencies implemented in the last few years . . . entry barriers are now minimal, significant new entry is occurring and we have recognized that the appropriate measure of market share is the number of frequencies allocated." *James T. Rill* (Communications Industries-Pactel Transfer), 60 Rad. Reg.2d 583, 602 (1986). In addition, this Commission has caused the paging market to become even more competitive by allocating additional paging channels and virtually all those who want paging channels can apply for and receive them.[10] We find that the relevant product market is the provision of paging service and the geographic component of the relevant market to be the demand for paging services, as measured by a "community of interest standard.[11] American's analysis of these traditional antitrust guidelines limited the market share component to common carrier one-way paging and its HHI calculations are therefore inaccurate. Further, we find that American's contentions with regard to BellSouth's alleged prior predatory acts to be speculative and erroneous. In this regard, the complaints referred to by American are still pending and we find that the state complaint procedures provide sufficient safeguards against any attempts at improper behavior. Equally unavailing are American's arguments regarding future competitive harm and distortion of relevant competitive markets. BellSouth's purported advantages in technology and marketing pre-date the transfer and have not interfered with American's ability to capture, based on its own statistics, the largest market share of common carrier paging in the Mobile, Alabama LATA. Lastly, we have reviewed all of the uncontested applications for transfer of control of Public Land Mobile Service facilities listed in the Appendix and find that grant of these applications would likewise be consistent with the Commission's rules and with the public interest.

ORDERING PARAGRAPHS

9. Accordingly, IT IS ORDERED that the Petition to Dismiss or Deny filed by American Mobilphone Paging, Inc. IS DENIED.

10. IT IS FURTHER ORDERED that the request filed by BellSouth Corporation for consent to transfer Mobilecomm of Alabama, Inc. PLMS stations KIF650, KRS687, KRS664, and KTS206 and Radio & Electronics Service Co. PLMS stations KLF639, KIY593, KWB455, KLF640 and KIF649 from Mobile Communications Corporation of America to BellSouth Corporation IS GRANTED.

11. IT IS FURTHER ORDERED that the applications listed in the Appendix ARE GRANTED.

12. This order is issued under Section 0.291 of the Commission's rules and is effective on its release date. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief
Common Carrier Bureau

APPENDIX

MCCA

Public Land Mobile Service:

Lincesee	Call Sign	Principal Location
AAA Anserphone, Inc. - Jackson	KRS 618	Hattiesburg, MS
	KDS 460	Hattiesburg, MS
	KKV 692	Jackson, MS
	KQZ 788	Jackson, MS
	WQZ 994	Jackson, MS
	WRV 287	Jackson, MS
	KSW 215	Jackson, MS
	WRW 285	Jackson, MS
	KNKD 739	Jackson, MS
	KNKC 505	Jackson, MS
Amarillo Communications Inc.	KLB 564	Amarillo, TX
	KTS 259	Amarillo, TX
	WRV 238	Amarillo, TX
Answer, Inc. of San Antonio	KKG 559	San Antonio, TX
	KWT 846	San Antonio, TX
	KUS 372	San Antonio, TX
	KPA 436	San Antonio, TX
	KNKD 917	San Antonio, TX
Bryan Industrial Electronics, Inc.	KWU 276	Bryan, TX
	KWU 336	Bryan, TX
	KAD 518	Bryan, TX
	KPE 280	Bryan, TX
MobileComm of Alabama, Inc.	KIF 650	Birmingham, AL
	KRS 687	Birmingham, AL
	KRS 664	Mobile, AL
	KTS 206	Mobile, AL

Licensee	Call Sign	Principal Location
Mobilecomm of Austin, Inc.	KKB 517	Austin, TX
	KPA 434	Austin, TX
	KKX 714	Austin, TX
	KOR 824	Austin, TX
	KNKC 432	Austin, TX
	KLF 661	Austin, TX
	KWU 473	Austin, TX
Mobilecomm of Baton Rouge, Inc.	KQZ 723	Baton Rouge, LA
	KLB 781	Baton Rouge, LA
	KDS 306	Baton Rouge, LA
	KNKC 698	Baton Rouge, LA
Mobilecomm of California Inc.	KMA 200	Burbank, CA
	KOR 912	Burbank, CA
	KSV 977	Burbank, CA
	WXS 233	Burbank, CA
	KOR 995	Burbank, CA
	KMA 249	Burbank, CA
	KSV 978	Burbank, CA
	KMA 253	Burbank, CA
	KMB 309	Burbank, CA
	WXR 983	Burbank, CA
	KMD 344	Long Beach, CA
	KSV 979	Long Beach, CA
	KPD 956	Long Beach, CA
	KNKC 696	Sacramento, CA
	KMA 260	San Bernardino, CA
	KAQ 628	San Bernardino, CA
	KPD 883	San Diego, CA
	KNKB 964	San Diego, CA
	KNKD 994	San Diego, CA
	KMM 599	San Francisco, CA [12]
	KNKB 781	San Francisco, CA

	KNKF 854	San Francisco, CA
	KPE 245	San Francisco, CA
	KOR 851	San Francisco, CA
	KMB 304	Santa Ana, CA
	KSV 980	Santa Ana, CA
	WXS 221	San Tana, CA
	KMA 835	Ventura, CA
	KSV 976	Ventura, CA
Mobilecomm of Florida, Inc.	WRW 259	Jacksonville,FL
	KPA 407	Miami, FL
	KPA 432	Orlando, FL
	KPA 411	Tampa, FL
Mobilecomm of Georgia, Inc.	KIE 953	Atlanta, GA
Mobilecomm of Illinois, Inc.	KPE 361	Chicago, IL
	KSD 316	Chicago, IL
	KTS 200	Chicago, IL
	KSB 590	Chicago, IL
	KNKE 376	Chicago, IL
	KUO 608	Chicago, IL
	KWU 501	Joliet, IL
	KSD 315	Merrillville, IN
Mobilecomm of Indianapolis, Inc.	KKB 707	Indianapolis, IN
	KKB 576	Indianapolis, IN
	KSA 811	Indianapolis, IN
	KUC 846	Indianapolis, IN
	WXS 430	Indianapolis, IN
	WXS 452	Indianapolis, IN
Mobilecomm of Massachusetts, Inc.	KPE 256	Boston, MA.
Mobilecomm of Memphis, Inc.	KDT 223	Memphis, TN
	KUO 621	Munford, TN
	WRD 361	Memphis, TN
	KUO 624	Tunica, MS

	KPA 308	Memphis, TN
	KNKB 561	Memphis, TN
	KRS 656	Memphis, TN
	KUC 870	Memphis, TN
	WRV 913	Memphis, TN
	KWU 331	Memphis, TN
	KIF 653	Memphis, TN
	KDS 452	Memphis, TN
	KWT 893	Memphis, TN
Mobilecomm of Merrillville, Inc.	KSD 311	Merrillville, IN
Mobilecomm of New York, Inc.	KPE 256	New York, N.Y. Boston, MA[13] Philadelphia, PA[14]
	KEA 274	New York, NY.
	KPA 454	New York, NY.
	KEJ 888	New York, NY.
	KNKI 517	New York, NY
	KGA 805	Pittsburgh, PA
	KWT 927	Pittsburgh, PA
	WXC 456	Pittsburgh, PA
Mobilecomm of Ohio, Inc.	KOR 962	Cleveland, OH
	KTS 283	Cleveland, OH
	KLF 508	Cleveland, OH
	KOR 888	Cleveland, OH
	KUS 280	Cleveland, OH
	KOR 889	Cleveland, OH
	KWU 243	Cleveland, OH
Mobilecomm of South Bend, Inc.	WRW 294	South Bend, IN.
	KWH 315	South Bend, IN.
	WQZ 656	South Bend, IN.

	KSV 987	South Bend, IN.
	KNKB 205	South Bend, IN.
Mobilecomm of Texas, Inc.	KPA 395	Dallas, TX
	KNKB 602	Dallas, TX
	KKB 530	Dallas, TX
	KKG 411	Dallas, TX
	WXS 343	Dallas, TX
	KNKI 291	Dallas, TX
	KLF 523	Gainesville, TX
	KLB 502	Sherman, TX
	KWH 329	Sherman, TX
	KNKC 614	San Antonio, TX
	KNKB 411	Austin, TX
	KNKD 497	Dallas, TX
	KNKB 586	San Antonio, TX
	KRS 652	San Antonio, TX
MobileComm of Virginia, Inc.	KPA 404	Washington, DC
	KPD 722	Washington, DC
	KPA 492	Washington, DC
MobileComm of Wisconsin, Inc.	KDS 735	Milwaukee, WI
	WXS 212	Milwaukee, WI
	KRS 715	Milwaukee, WI
	KUC 977	Milwaukee, WI
	KWU 262	Milwaukee, WI
	KKB 787	Milwaukee, WI
Mobile Telecommunications Corporation	KLB 563	Amarillo, TX
	KUC 883	Amarillo, TX
	KKB 413	Denton, TX
	KOR 936	El Paso, TX
	WQZ 599	El Paso, TX
	WQZ 602	El Paso, TX
	KRS 639	El Paso, TX
	KUC 840	Alamogordo, NM
	KPA 305	Alamogordo, NM
	KDS 451	Las Cruces, NM
	KKD 284	El Pasco, TX
	KLB 668	Las Cruces, NM
	KTS 284	El Paso, TX
	KKE 968	El Paso, TX

	KLB 687	El Paso, TX
	KLB 566	Alamogordo, NM
Radio & Electronics Service Company, Inc.	KLF 639	Ft. Walton Beach, FL
	KIY 593	Ft. Walton Beach, FL
	KWB 455	Ft. Walton Beach, FL
	KLF 640	Pensacola, FL
	KIF 649	Pensacola, FL
Radio Paging, Inc.	WQZ 629	Beaumont, TX
	KKI 445	Houston, TX
	KWU 485	Houston, TX
	KLF 613	Houston, TX
	KKG 561	Houston, TX
	WQZ 620	Houston, TX
	KKE 964	Houston, TX
	KNKB 571	Houston, TX
	WQZ 986	Houston, TX
Tel-Page Corporation	KEC 513	Buffalo, NY
	KEC 521	Buffalo, NY
	KRH 676	Buffalo, NY
	KEA 777	Buffalo, NY
	KEK 295	Elmira, NY
	KRH 636	Elmira, NY
	KEJ 894	Elmira, NY
	KUD 214	Rochester, NY
	KTR 997	Rochester, NY
	KUS 272	Rochester, NY
	KEC 518	Rochester, NY
	KGI 787	Rochester, NY
	KEJ 894	Rochester, NY
	KEC 941	Rochester, NY
	KDS 378	Rochester, NY
	KNKB 875	Rochester, NY
	KPB 286	Rochester, NY
	KRH 643	Syracuse, NY
	KUS 378	Syracuse, NY
	KWH 326	Syracuse, NY
	KRH 631	Syracuse, NY
	KEK 294	Utica, NY
Telpage of Nashville, Inc.	KLF 651	Nashville, TN
	KLF 652	Nashville, TN
	KUC 962	Nashville, TN
	KFL 864	Nashville, TN
	KIY 750	Nashville, TN

	KDS 379	Nashville, TN
	KUD 203	Nashville, TN
	KNKC 906	Nashville, TN
	KWT 857	Nashville, TN
	KWU 259	Nashville, TN
	KWT 967	Lebanon, TN
	KUS 274	Nashville, TN
	KNKC 764	Nashville, TN
	KUS 364	Nashville, TN
	KWT 966	Nashville, TN
	WRV 200	Nashville, TN
Telpage of Tennessee, Inc.	KKB 690	Chattanooga, TN
	KNKC 907	Chattanooga, TN
	KDS 706	Chattanooga, TN
	KLF 619	Chattanooga, TN
	KFL 916	Chattanooga, TN
	KPE 415	Chattanooga, TN
	KIM 900	Dalton, GA
	KKB 361	Dalton, GA

FOOTNOTES

[1] *Order*, 2 FCC Rcd 5516 (1988).

[2] *Order*, 3 FCC Rcd 5736 (1988).

[3] Section 309(a) of the Communications Act, in pertinent part, provides that: "the Commission shall determine, in the case of each application filed with it to which section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application . . . " American argues that this line of cases provides authority for the Commission to base its denial of an application solely on anticompetitive considerations.

[4] Petition at 6.

[5] BellSouth has filed a waiver request with the Department of Justice captioned *Request of BellSouth Corporation to Provide Limited MultiLATA Mobile Radio Services* (April 29, 1988).

[6] *1982 Merger Guidelines* II.C, 2 Trade Reg. Rep (CCH) Section 4502.30.

[7] On January 14, 1988, American filed a complaint against A+ Beepers, Inc. and South Central Bell. The Complaint alleges that A+ Beepers held itself out as the exclusive paging sales agent for South Central Bell and an agent of BellSouth Mobility, Inc., both operating subsidiaries of BellSouth. A+ Beepers allegedly acquired American's paging equipment and mislabeled this equipment with its own label, resold that service and equipment to a former American custormer in violation of Alabama law, and charged that customer less than what A+ Beepers was paying American for the service.

[8] American, in its Petition at 10 indicates that American holds 40%, BellSouth holds 29% and MCCA holds 29% of the market share for paging services in the Mobile LATA.

[9] It bears noting that American, throughout its Petition, cites the 1982 Merger Guidelines. However, as pointed out by BellSouth, the Merger Guidelines were substantially revised and updated in 1984. *See U. S. Department of Justice Merger Guidelines*, 4 Trade Reg. Rep. (CCH) para. 13,103 (released June 14, 1984).

[10] *Report and Order* in CC Docket No. 80-57, 95 FCC 2d 769, 800-1 (1983).

[11] The community of interest standard is determined by the business, shopping, commuting, and recreational patterns of the geographic area as applied to the predominant paging customers. Once the relevant product and geographic markets have been determined, the appropriate market shares of those firms that produce the relevant product are then used to calculate the premerger and post-merger HHI figures. The HHI is used as an indicator of market concentration, and is calculated by summing the squares of the individual market shares of all the firms that produce the relevant product. In evaluating proposed mergers, the Justice Department considers the post- merger HHI as well as the level of increase from the premerger to the post-merger HHI. *See Merger Guidelines* at Section 3.1, (CCH) para. 13,103 at 20,560.

[12] Under File No. 21195-CD-P/ML-1-88, the Commission has granted consent to the partial assignment of this license for facilities operating on 454.075 MHz at 500 University Avenue, Palo Alto, CA (Location No. 1) and at 3031 Tisch Way, San Jose, CA (Location No. 3) to McCaw RCC Communications, Inc. *See* Report No. PMS-88-29 dated April 13, 1988. The assignment will occur once state regulatory approval is obtained.

[13] A new call sign will be assigned by the Commission once it acts on the *pro forma* partial assignment application simultaneously filed herewith the Mobilecomm of New York, Inc. (Assignor), and Mobilecomm of Massachusetts, Inc. (Assignee).

[14] A new call sign will be assigned by the Commission once it acts on the *pro forma* partial assignment application simultaneously filed herewith by Mobilecomm of New York, Inc. (Assignor), and MobileComm of Pennsylvania, Inc. (Assignee).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Central Telephone Company's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs — AAD 7-1703

MEMORANDUM OPINION AND ORDER

Adopted: December 7, 1988; Released: December 15, 1988

By the Deputy Chief, Common Carrier Bureau:

TABLE OF CONTENTS

	Paragraph
I. Introduction and Background	1-4
II. General Issues	
A. Overall Sufficiency of the Manual	5-6
B. Nonregulated Activities	7
C. Incidental Activities	8-9
D. Affiliate Transactions	10-12
E. Employee Time Reporting	13-15
F. Joint Use of Network Plant	16-17
III. Account - by - Account Analysis	18
A. Accounts to be Added	19-20
B. Other Issues	21
C. Specific Accounts	22-33
IV. Procedural Issues	34-39
V. Ordering Clauses	40-41

I. INTRODUCTION AND BACKGROUND

1. On August 28, 1987, Central Telephone Company (Centel) filed a cost allocation manual pursuant to the *Joint Cost Order* [1] governing the accounting separation of Centel's regulated and nonregulated costs. Consistent with the requirements of the *Joint Cost Order*, Centel implemented the manual on January 1, 1988, concurrent with the implementation of the revised Uniform System of Accounts (USOA).[2] The manual includes a list of Centel's nonregulated activities, a list of activities Centel treats as incidental to regulated activities for accounting purposes, information on affiliate transactions, information on employee time reporting, and information describing how each revised USOA account is allocated between regulated and nonregulated activities.

2. One party filed comments on Centel's manual, and Centel filed a reply. [3] In addition to reviewing the pleadings, we have conducted our own review of the Centel manual to determine its consistency with the Commission's rules and policies. We have concluded that while the Centel manual is deficient in some respects, its format and content generally provide the Common Carrier Bureau (Bureau) with a sufficient understanding of the proposed cost allocation procedures to permit us to make an informed judgment as to the ability of the manual to discourage cross subsidy. We conclude that, overall, Centel's manual provides sufficient assurance against the misallocation of costs and revenues to permit Centel to continue to apply its manual pending submission of revisions that meet all Commission requirements.

3. We require that Centel specify in greater detail the procedures it intends to follow in apportioning the costs and revenues of regulated and nonregulated activities, and, in certain instances, that Centel correct ambiguities and omissions in its manual. We require Centel to submit revisions to its manual, and we shall solicit public comment on them. Any revisions to the manual that result from the instant Order should be made effective retroactive to January 1, 1988, to the extent possible.[4] We therefore approve Centel's cost allocation manual subject to a number of conditions and requirements for the submission of further information.

4. This Order is divided into three substantive sections. Section II discusses general issues, including issues regarding the portions of the manual that relate to nonregulated activities, incidental activities, affiliate transactions, and employee time reporting. Section III discusses issues raised in connection with the proposed apportionment methods and specific accounts. Section IV discusses certain procedural requirements for updating cost allocation manuals.

II. GENERAL ISSUES

A. Overall Sufficiency of the Manual

5. The *Joint Cost Order* listed five types of information that must be included in cost allocation manuals: (a) a description of each nonregulated activity; (b) a list of all the activities the company now accords incidental accounting treatment, and the justification for treating each as incidental; (c) a chart showing all corporate affiliates; (d) a statement identifying affiliates that engage in or will engage in transactions with the carrier entity and describing the nature, terms and frequency of such transactions; and (e) for each USOA account and subaccount, detailed specifications of the cost categories (or cost pools) to which amounts in the account or subaccount will be assigned, and of the allocation method for each cost category (or pool).[5] In addition, the manuals must describe the methods used to teach, monitor, and enforce accurate time reporting, as well as the methods for capturing and allocating the costs of nonproductive time.[6]

6. Generally, we find that Centel's manual contains cost accounting procedures that are adequate to meet our requirements and that are at a level of detail necessary for us to conclude that the manual's procedures will discourage cross subsidy. Moreover, we believe that, overall, Centel's manual will provide an adequate basis for Commission audits. We note, however, that a number of ambiguities and omissions exist in the manual that must

be corrected by the submission of additional information and amendments. We do not believe, however, that these omissions or other defects in Centel's manual require its rejection. Instead, we believe the best procedure is to permit Centel to continue to implement its manual, while requiring it to make revisions. Our approval of Centel's manual, therefore, is conditioned upon the timely submission of revisions responsive to the matters discussed in this Order.

B. Nonregulated Activities

7. The Centel manual provides the requisite description of Centel's nonregulated activities.[7] Centel lists four types of nonregulated activities that it offers: (1) Marketing, Installation and Maintenance of Customer Premises Equipment (CPE); (2) Installation and Maintenance of Inside Wire; (3) Network Services (marketing of AT&T long distance credit card and WATS service); and (4) Other Services. Under "Other Services," Centel lists twenty-four activities as nonregulated which it states it "engages in to a lesser degree." In its revisions, Centel must explain the meaning of "to a lesser degree" in connection with these activities, and why it does not list these activities as separate nonregulated activities.

C. Incidental Activities

8. Centel's manual also provides, as required, a list of nonregulated activities that are offered on an incidental basis to regulated activities.[8] In the *Joint Cost Order*, the Commission permitted carriers to account for incidental activities as regulated activities, provided that each of the activities meets the following quantitative and qualitative tests: (a) the activity must be an outgrowth of regulated operations; (b) it cannot constitute a separate line of business; (c) it must have traditionally been treated as incidental for accounting purposes; and (d) the revenues from all of a carrier's incidental activities must not exceed one percent of its total revenues.[9]

9. Our review of the incidental activities section of Centel's manual[10] indicates that, with one exception, Centel has met the requirements of the *Joint Cost Order*. The exception concerns Centel's treatment of "Leasing of land and building space." To the extent that this is an activity that is provided to affiliates, it constitutes an affiliate transaction, and its costs must be recorded according to the affiliate transactions rules. Services provided to affiliates must always be treated for accounting purposes as affiliate transactions.[11] Centel must delete from its list of incidental activities "Leasing of land and building space" if it is an affiliate transaction. Additionally, Centel must amend the affiliate transaction section of its manual to reflect the addition of this activity if it was listed incorrectly as incidental.

D. Affiliate Transactions

10. The *Joint Cost Order* establishes specific rules governing the provision of assets and services to and from affiliates. These rules were adopted in order to discourage carriers from avoiding the cost allocation rules through affiliate transactions. For example, if a carrier wished to cross subsidize a nonregulated activity, it could, in the absence of the affiliate transaction rules, engage in that activity through a separate but affiliated company which would receive assets or services from the carrier at prices less than the carrier's fully distributed costs. The affiliate transaction rules specify the valuation standards that will be applied in accounting for transactions between a carrier and its affiliates. Those rules vary depending upon whether the transaction involves assets or services.[12] The *Joint Cost Order* also required that carriers include in their cost allocation manuals "[a] statement identifying affiliates that engage in or will engage in transactions with the carrier entity and describing the nature, terms, and frequency of such transactions."[13]

11. Centel's manual contains a section that lists and briefly describes the affiliates with which Centel has transactions, and the nature, terms, and frequency of these transactions.[14] Our review of this section reveals two issues that must be addressed by Centel in amendments to its manual. Initially, Centel states, under the heading of "Asset Transfers," that "[t]he valuation of assets purchased from nonregulated affiliates is determined by the price lists held out to the general public, if available, or comparable market prices are used."[15] This is inconsistent with the requirements of the *Joint Cost Order*. As stated above, assets transferred from affiliates to the carrier, if not recorded at the prevailing price, will be recorded at the lower of net book cost or fair market value.[16] Centel must amend its manual to correct this inconsistency.

12. Additionally, it is not clear from Centel's descriptions of its transactions whether the asset or service rules apply. For example, under the heading of transactions "Nonregulated Affiliated Company Services Provided to Regulated Companies," Centel states that Centel Business Systems sells business communications systems equipment to affiliated telephone companies, and states that these "services" are provided when requested and billed as incurred.[17] Centel does not indicate whether these transactions involve the transfer of assets, the provision of services, or both. Centel must amend its manual to correct this ambiguity with regard to each of its affiliate transactions.

E. Employee Time Reporting

13. The *Joint Cost Order* permits carriers to select from among several methods of recording employee time. The Commission reasoned that, since the use of wages and salaries would serve as an important technique in the allocation of costs, it was important that carriers use accurate methods of recording employee time. The Commission further found that no one time reporting system would provide accurate results in all situations. Carriers are therefore free to propose the use of positive time reporting or exception time reporting, or to develop special studies to keep track of employee time. The *Joint Cost Order* also required that carriers include in their manuals a description of the methods used to teach, monitor and enforce accurate time reporting. In addition, carriers must describe methods used to capture the costs of nonproductive time and the methods used to allocate those costs.[18]

14. In its cost manual, Centel proposes using three time reporting methods: (1) positive time reporting, (2) exception time reporting, and (3) survey time reporting.[19] There were no comments filed regarding Centel's time reporting procedures and methods.

15. Our review of Centel's treatment of employee time reporting shows that Centel must provide additional information on this matter. Initially, while Centel identifies groups of employees to which various time reporting methods apply, it does not indicate whether the time

reporting methods apply to support staff and management of these groups. Centel must amend its manual to clarify this matter. Additionally, under its discussion of "Exception Time Reporting," Centel must specify the time reporting increments it will use to record this time. Finally, Centel must provide more information on its procedures for capturing nonproductive time. While its manual contains a brief paragraph on nonproductive time,[20] it does not provide the details of its procedures for capturing this time. Centel must amend it manual to provide this information.

F. Joint Use of Network Plant

16. In the *Joint Cost Order*, the Commission established that jointly-used network plant (central office equipment and outside plant) must be allocated based on a forecast of the peak relative nonregulated usage of the plant over its entire depreciable life. The Commission elected to adopt a forecasted use approach in order to reflect the nature of capital investment decisions, *i.e.*, that investment decisions are made in anticipation of future use.[21] On reconsideration, the Commission reduced the length of the forecast period to three years in recognition of the practical difficulties of forecasting relative use over a lengthy depreciation period.[22]

17. Centel does not address the issue of joint use of network plant in its cost manual, although it appears from our review of the manual that Centel has no current plans for such joint use. In its comments, IBM notes that although Centel does not currently intend to use network plant jointly, and will provide transmission services used in its own nonregulated activities at tariffed rates, it should be required to revise its cost manual to implement the principle of allocation of investment risks before it begins to share investments.[23] In its reply, Centel acknowledges that it does not use network plant jointly for the provision of regulated and nonregulated services, but that if and when it does, it will revise its cost manual to incorporate the use of the forward-looking allocator as required by the Commission.[24] We require Centel make two revisions with respect to this issue. First, Centel must amend its manual to state that it does not now use network plant jointly for the provision of regulated and nonregulated services. Second, at such time that Centel's three-year forecasts of future operations indicate a planned sharing of network plant for regulated and nonregulated services, Centel must amend its manual to provide for forward- looking allocators.

III. ACCOUNT - BY - ACCOUNT ANALYSIS

18. Centel's manual describes the methods it proposes to use to derive cost pools and to apportion costs between regulated and nonregulated activities in two places. First, Centel provides a narrative description of its cost apportionment bases.[25] Second, Centel provides apportionment information in table format.[26] In addition to addressing the issues raised by the parties with respect to the cost pool assignment and cost apportionment bases for individual accounts contained in the manual, we have reviewed the manual and identified additional issues to be resolved. Before discussing these specific account issues, however, we will note several required accounts that are not included in Centel's manual.

A. Accounts To Be Added

19. In the *Joint Cost Order*, the Commission required that carriers submit allocation proposals for each USOA account and subaccount.[27] Since that requirement would have mandated the allocation of amounts that are not used in the jurisdictional separations and interstate ratemaking processes, the *ARMIS Order* eliminated the allocation requirement for particular accounts. [28] Appendix C to the *ARMIS Order* listed for the first time the particular USOA accounts and subaccounts that would be subject to joint cost reporting. In addition, the Commission required carriers to report on six additional accounts used in the interstate ratemaking process. These 1 additional accounts are: Account 2004 - Telecommunication Plant Under Construction-Long Term, Account 2441 - Conduit Systems, Account 4120 - Other Accrued Liabilities, Account 4360 - Other Deferred Credits, Account 5050 - Customer Premises Revenue, and Account 7150 - Gains and Losses From Disposition of Land and Artworks.[29]

20. Because the list released in the *ARMIS Order* was not available until after Centel filed its manual, the manual omits many accounts contained on that list. The manual also omits three of the six accounts listed above -- Account 4120 - Other Accrued Liabilities, Account 4360 - Other Deferred Credits, and Account 5050 - Customer Premises Revenues. We direct Centel to amend its manual to include allocation proposals for each of the omitted accounts. If, in making these revisions, Centel finds that there are accounts for which it has nothing to report, it must list these accounts in its manual and indicate that it has nothing to report.

B. Other Issues

21. Centel states in the cover letter to its manual that, "[a]ny costs directly assignable to a nonregulated account are not included in its manual."[30] In this connection, under its description of cost apportionment bases, Centel indicates that several categories of costs will be assigned directly to nonregulated accounts.[31] The *Joint Cost Order* prohibits the use of separate books of accounts for nonregulated activities that use common plant.[32] Additionally, as we have stated elsewhere, separate books of accounts are not permissible if any nonregulated activities benefit from any joint or common costs, including residual overhead costs.[33] Centel has presented no evidence that any of its nonregulated activities do not benefit from some joint or common plant, or, at a minimum, from some residual overheads. Moreover, the purpose of the cost allocation manual is to provide a regulatory check on the ability of carriers to apportion their costs between regulated and nonregulated operations. The manual must therefore reflect all of a carrier's cost and revenues that we must evaluate to ensure that the Commission's requirements are being met. Excluding an unspecified amount of costs and revenues from the manual does not provide us with sufficient information to ensure that the Commission's rules are being followed. Accordingly, Centel is directed to amend its cost manual to allocate all investments, expenses, and revenues used for nonregulated activities to a nonregulated cost pool under the appropriate regulated account, and to assign those costs or revenues directly to nonregulated activities. Moreover, after such amendments are made, Centel must recalculate its general allocator to reflect the addition of these nonregulated costs and revenues.

C. Specific Accounts

Account 2113 - Aircraft and Account 6113 - Aircraft Expense

22. Centel does not list Account 2113 - Aircraft, in its cost apportionment table, but does list Account 6113 - Aircraft Expense, which it apportions to regulated and nonregulated activities based on the general allocator. Centel must include Account 2113 in its manual, even though it may not have any investment in this account. Additionally, we believe that Centel can use a more cost causative method, such as the use or records or logs, to apportion aircraft expenses, and Centel is directed it to amend its manual to do so.

Account 2124 - General Purpose Computers and Account 6124 - General Purpose Computers Expense

23. Centel proposes to have one cost pool for Account 2124, which it will apportion to regulated and nonregulated activities based on the general allocator. Conversely, for the corresponding expense Account 6124, it proposes eight cost pools, which it develops on the basis of an analysis of computer usage. The costs in three of these pools will be assigned directly to regulated activities, the cost in four others will be indirectly attributed to regulated and nonregulated activities, and the costs in one will be apportioned based on the general allocator. While we concur generally with Centel's proposals to apportion Account 6124,[34] we do not agree with its procedures to apportion Account 2124. Centel must explain how it can develop several cost pools for Account 6124, and apportion the costs in these pools by various apportionment methods, but cannot develop similar cost pools and apportionment methods for the related investment account. Absent a plausible explanation, Centel must amend its manual to apportion the costs in Account 2124 on the same basis as it uses in Account 6124.

Account 2681 - Capital Leases

24. Centel proposes to apportion the "General Purpose Computer" cost pool in this account on the basis of the apportionment method used for Account 2124 - General Purpose Computers. Centel proposes to use the general allocator to apportion Account 2124, and we have directed Centel to use a more cost causative allocator to that account (*see* paragraph 23, *supra*). Similarly, Centel must change the apportionment procedure for this cost pool to conform with that used for its revised Account 2124.

Account 2690 - Intangibles, Account 3500 - Accumulated Amortization - Intangibles, and Account 6564 - Amortization Expense - Intangibles

25. Centel has one cost pool for Account 2690, which it attributes indirectly to regulated and nonregulated activities based on an analysis of intangible costs. In the "Comments" column for this account Centel states that, "[a]n Analysis of this account is performed to determine the nature of the assets generating the intangible for assignment to the regulated, nonregulated or common cost pools. The common cost pool is apportioned on the basis of the asset generating the intangible." We note that while Centel refers to "regulated," "nonregulated" and "common" cost pools in its comments, the cost pool column lists only one cost pool, entitled "Same as Account." Centel is directed to amend its manual to list three cost pools for this account, "regulated," "nonregulated" and "common." Additionally, Centel must directly assign the "regulated" and "nonregulated" costs pools, and apportion the "common" cost pool using the ratio of nonregulated to regulated directly assigned costs. Finally, we direct Centel to make corresponding changes for Account 3500 -Accumulated Amortization -Intangibles and Account 6564 -Amortization Expense - Intangibles, both of which are allocated based on the allocation of Account 2690.

Account 6362 - Other Terminal Equipment Expense

26. Centel proposes one cost pool for this account which it will assign directly to regulated activities based on the related investment in Account 2362 - Other Terminal Equipment Investment. We do not agree with this procedure. Since expenses related to the provision of inside wire, a nonregulated activity, are included in this account, Centel must establish a cost pool for expenses related to the provision of inside wire, and assign the costs in that pool directly to nonregulated activities.

Account 6534 - Plant Operations Administrative Expense and Account 6535 - Engineering Expense

27. Centel must clarify whether construction related costs are cleared from these accounts before the apportionment to nonregulated activities occurs.

Account 6623 - Customer Services Expense, Account 6721 - Accounting and Finance Expense, and Account 6724 - Information Management Expense

28. Centel has established several cost pools within each of these accounts. One cost pool in each account is apportioned to regulated and nonregulated activities on the basis of a "survey." Although Centel generally describes "surveys" under its "Description of Cost Apportionment Bases," it does not provide details of these surveys as they pertain to the particular accounts. Centel is directed to amend its manual to provide such details.

Account 6711 - Executive Expense and Account 6712 - Executive Planning Expense

29. Centel proposes to apportion the costs in these accounts on the basis of the general allocator. Centel must attempt to assign or attribute these costs either directly or indirectly before using the general allocator. The general allocator should be used only if costs cannot be assigned or attributed on some cost causative basis. We believe a substantial portion of these accounts can be assigned or attributed.

Account 6724 - Legal Expenses

30. Centel will have two cost pools for this account, "Regulated" and "Common," and will directly assign the regulated costs, while apportioning the common costs based on the general allocator. Initially, we direct Centel to establish a "Nonregulated" cost pool, and directly assign the costs in that pool to nonregulated activities. Additionally, we note that a common pool for this account will include both common legal expenses and overhead expenses, such as law library and and general research costs. Since the overhead expenses support all of the Centel activities for which legal expenses are incurred, Centel should create a separate cost pool for overhead expenses. While we have no objection to use of the general allocator to allocate the common expense cost pool,

Centel must apportion the "overhead" cost pool in the same proportion as its directly assigned legal expenses are apportioned. Centel shall amend its manual accordingly.

Account 6726 - Procurement Expense

31. Centel proposes one cost pool for this account, which it will apportion based on the general allocator. We believe a more direct method, such as time reporting, can be used to apportion these costs. We direct Centel to develop a more cost causative method for apportioning these expenses.

Account 7150 - Gains or Losses From the Disposition of Land and Artwork

32. The comment column for this account appears to contain an incomplete statement. Centel is directed to amend its manual to correct this apparent discrepancy.

Account 7220 - Operating Federal Income Taxes, Account 7230 - Operating State and Local Income Taxes, and Account 7250 - Provision for Deferred Operating Income Taxes - Net

33. Centel proposes to apportion the current income tax accounts based on the "ratio of nonregulated pre-tax book income to total pre-tax book income," and the provision for deferred operating income taxes account on an "analysis of timing differences." Applying different apportionment bases to any one or group of these accounts could result in the apportionment of these costs in a manner that is inconsistent with the related book income. The net book taxes resulting from these accounts should reflect normalized taxes based on book income, since under the revised USOA, interperiod tax allocations are used for accounting purposes. If all three of these accounts are allocated based on a specifically-defined book income, the taxes apportioned should result in an appropriate distribution between regulated and nonregulated activities. We believe that book income should be operating book income before taxes and minus interest expense. Our proposed methodology ensures that the costs are being allocated in a straightforward manner, and better reflects the costs being allocated – income taxes. Centel is directed to amend its manual to conform with our methodology.

IV. PROCEDURAL ISSUES

34. In this section we address two procedural issues affecting Centel's cost allocation manual. These issues are: (a) the submission of a revised manual in compliance with this Order, and (b) the routine submission of future amendments to the manual.

35. *Revised manual.* We have required Centel to submit several amendments clarifying and changing many of its cost apportionment procedures. We have also directed Centel to submit additional information concerning its incidental activities, affiliate transactions, and time reporting mechanisms. In many cases, the additional information requested is needed to form a judgment concerning the reasonableness of Centel's proposed methods. In the *Joint Cost Order*, the Commission specifically provided for public comment on the manuals so that a determination on their compliance with Commission requirements would be based on a full record and so that the cost allocation methodologies would be exposed to public scrutiny prior to their implementation.[35] Similarly, we believe that our review of Centel's amendments will be aided by public comment on the revisions.

36. We will evaluate the proposed revisions, as well as the comments that we receive, before issuing an order approving or disapproving the amendments. If we disapprove a proposed revision, we shall take whatever further action is required, including mandating specific allocation methodologies or other procedures, consistent with our delegated authority to implement cost allocation manuals. In addition, to facilitate our review of the updated manual and its availability to the public, Centel shall file two updated copies of its revised manual with the Commission in looseleaf form with numbered and dated pages, within 60 days of the release date of this Order.[36] When amendments are submitted, each revised page must clearly indicate the word "REVISED" and the date next to the page number. All amended language must be indicated by a vertical line in the right margin of the page.

37. *Routine amendments.* We also must resolve the issue of the procedures Centel will be required to follow when updating its cost allocation manual. We conclude that Centel will be subject to the same requirements that we imposed on the Bell Operating Companies (BOCs).[37] As we have determined in the BOC context, we recognize that the accuracy of different sections of the manual will have different effects on our ability to monitor the cost allocation process. Therefore, we will apply the following requirements for the update of Centel's manual. First, because it is important for the Commission to obtain current information on the cost categories and how these are allocated between regulated and nonregulated activities, two categories of information require our attention before the manual is implemented. These are: (1) changes to the cost categories and their allocation mechanisms; and (2) changes in the way employee time, including nonproductive time, is allocated. Each of these changes in the cost manuals must be submitted at least 60 days prior to implementation. Parties seeking to comment on the proposed amendments will be provided an opportunity to do so prior to implementation and will be notified by public notice of the comment dates. The proposed amendments to the manual will be deemed accepted unless the Bureau, pursuant to its delegated authority, rejects or stays the effectiveness of the change.[38]

38. Second, because other information, such as corporate structure, may not be quite as critical for cost allocation monitoring purposes, we require that Centel file such changes in a timely manner.[39] A modification to a carrier's cost manual to reflect a corporate reorganization does not require our advance approval and, therefore, does not need to be filed prior to the corporate restructuring. Finally, all other changes to the manual should be submitted quarterly, on March 31, June 30, September 30 and December 31 of each year.

39. We believe that these procedures will ensure that the ongoing process of implementing cost allocations will continue to be conducted according to the requirements in the *Joint Cost Order*. At the same time, they minimize the number of times Centel must seek prior Commission approval before implementing a change and provides a system to ensure timely review of Centel's proposals.

V. ORDERING CLAUSES

40. ACCORDINGLY, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. Section 154(i), that the Cost Allocation Manual filed by Centel IS APPROVED, subject to the conditions noted in this Order.

41. IT IS FURTHER ORDERED that revised copies of the Cost Allocation Manual shall be submitted within 60 days from the release date of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Common Carrier Bureau

FOOTNOTES

[1] Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, *Report and Order*, CC Docket 86-111, 2 FCC Rcd 1298 (1987) (*Joint Cost Order*), *recon.*, 2 FCC Rcd 6283 (1987) (*Reconsideration Order*), *further recon.*, FCC 88-355 (released November 18, 1988), *petitions for review pending*, Southwestern Bell Tel. Corp. v. FCC, D.C. Circuit No. 87-1764 (filed Dec. 14, 1987); National Tel. Cooperative Ass'n v. FCC, D.C. Circuit No. 87-1771 (filed December 15, 1987).

[2] 47 C.F.R. Part 32.

[3] Comments were filed by International Business Machines Corporation (IBM).

[4] In those instances where Centel cannot make revisions retroactive to January 1, 1988, it must explain in a cover letter accompanying its revised manual its reasons for not doing so. With regard to those revisions that Centel claims that it cannot make retroactive, we reserve the right to require retroactivity, or that subsequent adjustments be made to reflect the impact of the lack of retroactivity on 1988 operations.

[5] *Joint Cost Order*, 2 FCC Rcd at 1328. The *Joint Cost Order* uses the term "cost categories" to describe groupings of costs that are homogeneous in nature for cost allocation purposes. The accounting profession's term for "cost categories" is "cost pools." We will use the two terms interchangeably in this Order.

[6] *Id.* at 1321-22.

[7] *See* Centel Manual at Section IV.

[8] *Id.* at Section V.

[9] *Joint Cost Order*, 2 FCC Rcd at 1328.

[10] Centel Manual at Section V.

[11] *See, e.g.*, Pacific Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 287, 290 (1988) (*Pacific Order*).

[12] *See Joint Cost Order*, 2 FCC Rcd at 1355; *Reconsideration Order*, 2 FCC Rcd at 6295. Carriers must value services at the prevailing price, if the service is generally available to the public. If it is not generally available, carriers must allocate the cost of the service pursuant to the cost allocation standards of Section 64.901 of the Commission's Rules. For assets, carriers must record transactions at the prevailing price, if one exists. If not, carriers must record assets transferred from the affiliate to the carrier at the lower of net book cost or fair market value, while assets transferred from the carrier to the affiliate will be recorded at the higher of net book cost or fair market value. *Joint Cost Order*, 2 FCC Rcd at 1343, 1345, *amended by Reconsideration Order*, 2 FCC Rcd at 6308-09.

[13] *Joint Cost Order*, 2 FCC Rcd at 1328.

[14] Centel Manual at Section VII.

[15] *Id.* at VII-1.

[16] *See* note 12, *supra*.

[17] Centel Manual at VII-2.

[18] *Joint Cost Order*, 2 FCC Rcd at 1321-22.

[19] Centel Manual at Section VIII.

[20] *Id.* at VIII-3.

[21] *Joint Cost Order*, 2 FCC Rcd at 1319.

[22] *Reconsideration Order*, 2 FCC Rcd at 6288.

[23] IBM Comments at 4, n. 4.

[24] Centel Reply at 1-2.

[25] Centel Manual at III-1 to III-6.

[26] *Id.* at III-7 to III-115.

[27] *Joint Cost Order*, 2 FCC Rcd at 1328.

[28] Automated Reporting Requirements for Certain Class A and Tier I Telephone Companies, Report and Order, 2 FCC Rcd 5770, 5775 (1987) (*ARMIS Order*), *recon.*, FCC 88-311 (released October 14, 1988).

[29] Carriers must include these accounts in future releases of the ARMIS reporting requirements.

[30] *See* Letter from Stephen M. Bailor, Controller, Telephone Operations,Central Telephone Company, to William J. Tricarico, Secretary, FederalCommunications Commission, dated August 28, 1987.

[31] Centel Manual at III-2 to III-6.

[32] *Joint Cost Order*, 2 FCC Rcd at 1337-40.

[33] *See* U S West's Permanent Cost Allocation Manual for the Separation ofRegulated and Nonregulated Costs, 3 FCC Rcd 195, 202 (1988) (*U S West Order*).

[34] One cost pool in Account 6124, "Property Accounting," will be apportioned to regulated and nonregulated activities on the basis of a "survey." Centel must provide details of how this survey will be conducted.

[35] We require Centel to serve copies of its revised manual on all parties to this proceeding.

[36] One copy will be made available in the Accounting and Audits Division reference room, while the other will be maintained for staff use.

[37] *See, e.g.*, Pacific Order, 3 FCC Rcd at 287.

[38] A stay of the effectiveness of a proposed change will not extend beyond180 days.

[39] Of course, changes to corporate structure that also affect costcategories need to be filed in advance of implementation, as discussed *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

COMMENTS INVITED ON NORTH CENTRAL AND NORTH EAST TEXAS PUBLIC SAFETY PLAN

Released: December 7, 1988

The Commission has received the public safety radio communications plan for the North Central and North East Texas area (Region 40).

In accordance with the Commission's Report and Order in General Docket 87-112 implementing the Public Safety National Plan, parties are hereby given thirty days from the date of Federal Register publication of this public notice to file comments and fifteen days to reply to any comments filed. (*See* Report and Order, General Docket 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

In accordance with the Commission's Memorandum Opinion and Order in General Docket 87-112, Region 40 consists of the following Texas counties: Cooke, Grayson, Fannin, Lamar, Red River, Bowie, Wise, Denton, Collin, Hunt, Delta, Hopkins, Franklin, Titus, Morris, Cass, Tarrant, Dallas, Palo Pinto, Parker, Rockwall, Kaufman, Rains, VanZandt, Wood, Smith, Camp, Upshur, Gregg, Marion, Harrison, Panola, Rusk, Cherokee, Anderson, Henderson, Navarro, Ellis, Johnson, Hood, Somervell and Erath. (*See* Memorandum Opinion and Order, General Docket 87-112, 3 FCC Rcd 2113 (1988).)

Comments should be clearly identified as submissions to General Docket 88 - 549, North Central and North East Texas Area - Region 40, and commenters should send an original and five copies to the Secretary, Federal Communications Commission, Washington, D.C. 20554.

Questions regarding this public notice may be directed to Fred Thomas, Office of Engineering and Technology, (202) 653-8112, or Marty Liebman, Private Radio Bureau, (202) 632-6497.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

CITY OF PALM DESERT, CALIFORNIA — CSR-3040 CA0058
Palm Desert, California

Petition for Special Relief

MEMORANDUM OPINION AND ORDER

Adopted: December 6, 1988; Released: December 16, 1988

By the Chief, Video Services Division:

1. On January 9, 1987, the City of Palm Desert, California, filed a "Petition for Waiver" of Section 76.33(a)(2) of the Commission's Rules. This petition was opposed by Palmer Communications, Inc., d/b/a Coachella Valley Television, operator of a cable television system serving Palm Desert, and Palm Desert has replied.

2. In this case, there is no dispute concerning the Grade B service throughout Palm Desert from two stations licensed to Palm Springs, KMIR-TV (NBC) and KESQ-TV (ABC). The only issue is whether or not there is a third station which serves Palm Desert within the meaning of Section 76.33 of the Rules. The parties dispute the status of translator station K66BM and that of two stations licensed to Los Angeles. However, regardless of the service from these disputed signals, another television broadcast translator station, K55FI, has now been licensed to Palmer Communications, Inc., in Palm Desert. For the purposes of effective competition determinations, the Commission expressly stated that it would "count an unduplicated signal provided by a television translator authorized to serve the cable community on an equal basis with full power stations. We will presume that a translator is serving a community if the community is wholly within the protected contour specified in Section 74.707 of the rules." *Second Report and Order in MM Docket No. 84 - 1296*, 3 FCC Rcd 2617, 2620 (1988). K55FI retransmits the signal of KCBS-TV (CBS), Los Angeles, California and Palm Desert is totally within the translator station's protected contour, as specified by Section 74.707 of the Rules. K55FI counts, therefore, on an equal basis with the other two full-power stations licensed to Palm Springs, KMIR-TV and KESQ-TV. We conclude that three stations, K55FI, KMIR-TV and KESQ-TV are available in Palm Desert, and that there is, therefore, effective competition in that community,..within the meaning of Section 76.33(a)(2) of the Rules.

3. In view of the foregoing, we find pursuant to Section 0.283 of the Commission's Rules, that grant of Palm Desert's petition for waiver is not in the public interest.

4. Accordingly, IT IS ORDERED, that the "Petition for Waiver" filed January 9, 1987, by the City of Palm Desert, California IS DENIED and its request for stay IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Video Services Division

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Annual 1988 Access Tariff Filings

MEMORANDUM OPINION AND ORDER

Adopted: December 8, 1988; Released: December 16, 1988

By the Deputy Chief, Common Carrier Bureau:

I. INTRODUCTION

1. Our review of the annual 1988 access tariffs revealed a number of specific instances in which erroneous projections of demand or costs would produce excessive rates for switched access service.[1] In one such instance, we tentatively determined that the National Exchange Carrier Association (NECA) had erred in determining the Universal Service Fund (USF) component of the Carrier Common Line (CCL) revenue requirement. We therefore directed NECA to reduce its CCL revenue requirement to reflect the use of the currently effective authorized rate of return and federal income tax rate. *December 24 Order*, 3 FCC Rcd at 1294.

2. On January 27, 1988, NECA filed a petition for reconsideration in which it claimed that Sections 36.611(a)(5) and 36.601(b) of the Commission's Rules, 47 C.F.R. §§ 36.611(a)(5), 36.601(b), require it to use data from a preceding year in computing the annual USF expense adjustment. By a Public Notice released June 27, 1988, we noted that NECA's petition appeared to raise an important issue regarding the application and intent of the Commission's Rules. We therefore decided that the petition should be treated as a petition for declaratory ruling pursuant to Section 1.2 of the Rules, 47 C.F.R. § 1.2, and invited interested parties to file comments.[2]

II. PLEADINGS

A. *NECA Petition*

3. NECA states that, in previous annual access filings, it has calculated the USF component of the CCL revenue requirement using both the booked taxes and rate of return for the preceding year and that it did not deviate from this practice in preparing the annual 1988 access tariff filing. NECA notes that "the USF data collected in June 1987 were the investment, expense and tax amounts on the companies' books for 1986, based on Part 67 of the Commission's Rules." NECA Petition at 2. In addition, NECA states, "[t]he return component on the 1986 net unseparated investment was the 1986 authorized interstate [rate of return] (12.75 percent)." *Id.* NECA calculated the additional interstate expense adjustment based on each individual study area's loop cost relative to the nationwide average loop cost. [3]

4. NECA notes that the Separations Manual, contained in Part 36 of the Commission's Rules, and not the Part 69 access charge rules, provides for the development of the USF expense adjustment. NECA argues that the separations rules require the use of booked taxes and prior calendar year rate of return in determining the USF expense adjustment. NECA quotes Section 36.611(a)(5) of the Commission's Rules, which describes one category of information that LECs must submit to NECA as

> [u]nseparated corporate operations expenses, operating taxes, and the benefits and rents portions of operating expenses. The amounts for each of these categories of expense shall be the actual amount for that expense for the calendar year preceding each June filing.

NECA Petition at 4. NECA also notes that Section 36.411 includes operating federal income taxes in the definition of operating taxes. *Id.*

5. NECA also observes that Section 36.621 of the Commission's Rules directs NECA to compute a portion of corporate operations and other expenses and taxes for use in calculating a study area's cost per subscriber loop. The basis for this assignment is "the unseparated operations and other expenses and taxes as reported in Section 36.611(a)(5)." *Id.* at 5. Moreover, NECA states, Section 36.601(b) provides that the expense adjustment is to be computed "on the basis of data for a preceding calendar year." NECA also notes that Part 69 of the Commission's Rules does not require that the USF adjustment be modified to reflect a future period. Finally, NECA states that all aspects of the USF have been based on historical costs since its inception. *Id.*

6. NECA also makes several other arguments that it believes demonstrate that we erred in requiring it to reduce its CCL revenue requirement. First, NECA asserts that our decision is inconsistent with earlier Commission and Joint Board decisions.[4] NECA asserts that implementation of the *December 24 Order* would require a complicated and relatively costly restatement process or inappropriate use of surrogate factors and is thus inconsistent with these recent expressions of Commission policy toward small LECs. *Id.* at 6-7. NECA also contends that our Order would cause data inaccuracies and administrative difficulties for small carriers. NECA claims that in order to implement our Order, individual LECs would have to recast their accounting records to reflect various tax changes and then recompute their 1986 taxes to reflect a theoretical 1986 tax liability based on 1988 tax regulations. NECA lists many changes contained in the Tax Reform Act of 1986 and concludes that, inasmuch as each change will affect each LEC differently, proper calculation of study area loop costs and the corresponding expense adjustment levels is virtually impossible unless the LECs recast their accounting data. *Id.* at 7-9. Finally, NECA alleges that our Order creates the potential for local rate increases. NECA hypothesizes that, if Subset 3 USF recipients are adversely affected by the recast of 1986 USF data, "local rate reviews may result." *Id.* at 10. Therefore, NECA concludes, the *December 24 Order* produces an effect that is contrary to the Commission's long-standing goal of promoting universal service. *Id.*

B. ***Comments***

7. Among the parties commenting, all but MCI support NECA's petition. The parties commenting in support of NECA, all either local exchange carriers or industry representatives, essentially echo the arguments advanced by NECA. The comments of TDS are fairly representative of the position of these parties. TDS asserts that the rules clearly state that historical data should be used. In addition, TDS contends that the cost burden on LECs of recasting their data would be excessive and that the benefits, if any, would be minimal. TDS Comments at 1-4; *see also* Southwestern Comments at 2. GTOC argues that the Commission clearly intended to use historical data for all components of the USF calculation. GTOC Comments at 4. Century concurs in these arguments and also states that, since its inception, all aspects of the USF have been based on historical costs. Century Comments at 3. NTCA argues that NECA's application of the Rules is consistent with the intended purpose and operation of the USF. NTCA believes that if the USF is to function properly, disbursements must be based on non-controversial, easily-obtainable information. Otherwise, NTCA warns, the process would be subjected to speculation and manipulation. NTCA Comments at 3-4.[5] Pacific argues that the USF expense adjustment should be based on historical rate of return and federal income tax data in order to avoid using inconsistent data items in calculating a single expense item. Pacific believes that consistency should be maintained in order to calculate a meaningful level of adjustment that will reflect LECs' actual experience. Pacific Comments at 4. Other comments present similar arguments.

8. In contrast, MCI argues that NECA's interpretation of the Rules is erroneous. MCI notes that Section 36.601(b) states that [t]he expense adjustment will be computed on the basis of data for a preceding calendar year which may be updated at the option of the carrier pursuant to Section 36.612(a). MCI Comments at 2. According to MCI, NECA is given a variety of options under the Rules to update preceding calendar year data to reflect changed circumstances. Thus, MCI argues, the Rules do not require NECA to use data from a preceding year, as NECA contends; rather, NECA has the option to use revised data. *Id.* at 3. MCI concludes that, given the magnitude of the changes at issue, and the fact that changes in rate of return and federal income tax rates occur relatively infrequently, the public interest "requires the very sort of easily calculated downward adjustment to the USF revenue requirement that the Commission ordered." *Id.* at 4. MCI also rejects NECA's contention that our Order requires costly and burdensome recasting of accounting data. Rather, MCI argues, all that is required is an apportionment among LECs of the7.8 million reduction in the same proportion as their original USF revenue requirement. *Id.* Finally, MCI concludes that no declaratory ruling is required because the Rules already provide for updates to the USF revenue requirement to reflect changed circumstances. *Id.* at 5.

C. ***Reply Comments***

9. Only two parties -- USTA and NTCA -- filed reply comments. USTA contends that the comments uniformly support NECA's position, contending that even MCI does not appear to object to the end result sought. USTA contends that the record shows that both LECs and their customers will benefit from granting NECA's petition and that the estimated CCL rate impact of granting NECA's petition would be only0.00005 per premium terminating minute of use. USTA Reply Comments at 1-2. NTCA, on the other hand, disputes MCI's interpretation of the Rules. NTCA notes that the Rules give LECs, not NECA, the option to update USF information. In addition, NTCA states that MCI fails to recognize other relevant rule language addressing the optional updates and their impact upon the USF expense adjustment. NTCA Reply Comments at 3-4. NTCA argues that the Rules demonstrate that the USF has been designed to distribute funds to high-cost LECs based on known information. Once this information is known, a LEC's USF distribution is set for 12 months unless the LEC chooses to update its loop cost information due to changes in its loop costs that would justify such an update. *Id.* at 4. Finally, NTCA reiterates its position that the process of revising USF data as required by our Order is more complex than MCI believes. *Id.* at 6-7.

III. DISCUSSION

10. As we noted in the *December 24 Order*, the question before us is one of the proper interpretation of Part 36, Subpart F, of the Commission's Rules. As such, and because we have elected to treat NECA's petition as a petition for declaratory ruling, many of the arguments in NECA's petition are not relevant to a determination of this issue.[6] Moreover, we find that NECA's reliance on the language of Section 36.611 of the rules is misplaced. That section simply establishes requirements for submission of data to NECA by the LECs and does not require that the preceding year rate of return and federal income tax be used in computing the USF expense adjustment.

11. Nevertheless, we are convinced upon further reflection that a proper interpretation of the Rules supports the methodology used by NECA. Section 36.601(b) of the Rules states that "[t]he expense adjustment will be computed on the basis of data for a preceding calendar year. . . ." Although Section 36.621 of the Rules, unlike Section 36.611, does not specify whether the rate of return or federal income tax rate from the preceding year is to be used in calculating loop costs for the expense adjustment, we believe that Section 36.601(b) represents a sufficiently clear statement of the Commission's intent to provide for the use of data from the preceding year in developing the USF expense adjustment. Moreover, we disagree with MCI's assertion that Section 36.601(b) gives NECA discretion to make use of updated data. The wording of Section 36.601(b) does not support MCI's interpretation.

IV. ORDERING CLAUSE

12. Accordingly, IT IS ORDERED that the petition for declaratory ruling filed by the National Exchange Carrier Association, Inc. IS GRANTED to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

FOOTNOTES

[1] *See* Annual 1988 Access Tariff Filings, 3 FCC Rcd 1281 (1988) (*December 24 Order*).

[2] Public Notice, NECA Petition for Reconsideration To Be Treated as Petition for Declaratory Ruling, DA 88-971, released June 27, 1988. Ten parties filed comments: the Bell Atlantic Telephone Companies (Bell Atlantic), CP National Corporation (CP National), Century Telephone Enterprises, Inc. (Century), the GTE Telephone Operating Companies (GTOC), MCI Telecommunciations Corporation (MCI), the National Telephone Cooperative Association (NTCA), the Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO), Pacific Bell and Nevada Bell (Pacific), Southwestern Bell Telephone Company (Southwestern), and Telephone and Data Systems, Inc. (TDS). Two parties filed reply comments: NTCA and the United States Telephone Association (USTA).

[3] The USF permits high-cost LECs to allocate additional expenses to the interstate jurisdiction to the extent that their local loop costs exceed 115 percent of the nationwide average.

[4] NECA cites *Regulation of Small Telephone Compnaies*, CC Docket No. 86-467, FCC 87-186, released June 29, 1987, and the Joint Board's *Second Recommended Decision and Order* in CC Docket No. 80-286, 48 F.R. 46556 (Oct. 13, 1983) in support of this contention.

[5] NTCA also distinguishes the USF Expense Adjustment from the concept of revenue requirements, which are traditionally estimated before the revenues are expected to be collected. NTCA contends that the USF expense adjustment was designed to function on past known quantities. NTCA Comments at 4.

[6] We need not rule on the merit of such essentially equitable arguments as the purported administrative burden our earlier interpretation of the Rules would require. These matters do not affect the proper interpretation of the Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY
AT&T OF PUERTO RICO, INC.
MCI INTERNATIONAL, INC.
RCA GLOBAL COMMUNICATIONS, INC.
US SPRINT COMMUNICATIONS COMPANY
WU WORLD COMMUNICATIONS, INC.

File No. I-T-C-88-071

Joint Application for Authorization Pursuant to Section 214 of the Communications Act of 1934, as Amended, to: (A) Construct the Transcaribbean Cable System; (B) Assign Capacity in that Cable System; (C) Acquire Overseas Extension Facilities; (D) Grant Capacity to Foreign Telecommunications Entities and (E) Activate and Operate these Facilities.

ERRATUM

Released: December 16, 1988

By the Chief, International Facilities Division:

1. The Commission's Order, released on September 15, 1988 (DA 88-1447) in the above-captioned matter was incomplete with respect to data in Appendix 4, Attachment D. The Order is hereby corrected to include the data previously omitted in Appendix 4, Attachment D which are appended hereto.

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX 4

ATTACHMENT D
(corrected)

AT&T EXTENSION FACILITIES REQUESTED

System	MAUOs Requested	Cost per Half-MAUO
Puerto Rico - St. Thomas	296	$637
St. Thomas - Tortola	296	$230

Eastern Caribbean Microwave System By segment	MAUOs Required	2Mb/s Channels Requested*	Cost ($000) Per 2 Mb/s Half-Channel
Tortola - Saba	280	10	21.4
Saba - St. Kitts	250	9	11.3
St. Kitts - Montserrat	245	9	16.7
Montserrat - Guadeloupe	192	7	14.0
Guadeloupe - Marie Galante	102	4	8.6
Marie Galante - Dominica	102	4	8.1
Dominica - Martinique	90	3	8.1
Martinique - St. Lucia	90	3	9.0
St. Lucia - St. Vincent	80	3	8.5
St. Vincent - Carriacou	43	2	12.2
Carriacou-Grenada	43	2	19.3
Grenada - Trinidad	30	1	18.4
Spurs			
Saba - St. Maarten	30	1	**
Montserrat - Antigua	49	2	47.5
St. Vincent - Barbados	24	1	89.0

* C&W provides capacity in the ECMS either on an individual MAUO or on a 2 Mb/s channel basis (30 MAUOs). Because individual MAUOs require more multiplex equipment than IRU obtained on a 2 Mb/s channel basis, it is more economical to purchase IRU on a 2 Mb/s channel basis when more than about 9 MAUOs are required.

** Capacity in the Saba-St. Maarten Spur will be obtained from Lands Radio on an IRU basis. Lands Radio, unlike C&W, has not yet fully developed its price for the IRU. Such price is expected to be commensurate with the price for the IRU being obtained from C&W, considering the size and fill of Lands Radio's digital microwave radio system.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 88-351

In the Matter of

The Plenipotentiary Conference of
the International Telecommunication
Union, Nice, France (1989)

REPORT AND ORDER

Adopted: November 22, 1988; Released: December 16, 1988

By the Commission:

TABLE OF CONTENTS

	Paragraphs
I. INTRODUCTION	1-6
II. NOTICE OF INQUIRY	7-8
III. SUMMARY OF COMMENTS	9-20
IV. DISCUSSION	21-22
V. PAPERWORK REDUCTION ANALYSIS	23
VI. REGULATORY FLEXIBILITY ANALYSIS	24
VII. ORDERING CLAUSES	25-27

APPENDIX A - List of Commenting Parties
APPENDIX B - Commenters/Issues
Cross-Reference Chart

I. INTRODUCTION

1. The International Telecommunication Union (ITU), founded in 1865 as the International Telegraph Union, is the world's oldest international, intergovernmental organization. The present day structure of the ITU was instituted at the 1947 Atlantic City Conference, at which time the ITU became recognized as the United Nations specialized agency responsible for international telecommunications matters. The United States, having ratified the current International Telecommunication Convention,[1] is one of the 165 Member countries of this international treaty organization. The ITU Convention is the basic instrument of the Union and addresses, *inter alia*, the composition, the purposes and the structure of the ITU.

2. Article 1 of the ITU Convention provides that the composition of the ITU is based on the principle of universality and that membership is made up of:

- any country listed in Annex 1 of the Convention which signs and ratifies, or accedes to, the Convention;

- any country not listed in Annex 1 of the Convention, which becomes a Member of the United Nations and which accedes to the Convention in accordance with Article 46 [Accession to the Convention];

- any sovereign country, not listed in Annex 1 of the Convention and not a Member of the United Nations, which applies for Membership of the Union and which, after having secured approval of such application by two-thirds of the Members of the Union, accedes to the Convention in accordance with Article 46.

3. Article 4 of the ITU Convention sets forth the general purposes of the ITU:

- to maintain and extend international cooperation between all Members of the Union for the improvement and rational use of telecommunications of all kinds, as well as to promote and to offer technical assistance to developing countries in the field of telecommunications;

- to promote the development of technical facilities and their most efficient operation with a view to improving the efficiency of telecommunications services, increasing their usefulness and making them, so far as possible, generally available to the public; and

- to harmonize the actions of nations in the attainment of those ends.

4. Article 5 of the ITU Convention provides that the ITU is structured as follows:

- the Plenipotentiary Conference

- Administrative Conferences

- the Administrative Council; and

- the permanent organs of the Union:

(a) the General Secretariat;

(b) the International Frequency Registration Board (IFRB);

(c) the International Radio Consultative Committee (CCIR); and

(d) the International Telegraph and Telephone Consultative Committee (CCITT).

5. The Plenipotentiary Conference (PLENIPOT) is the "supreme organ" of the Union - the ultimate governing meeting of all Member countries of the ITU. In accordance with the current ITU Convention, the PLENIPOT normally meets at intervals of five to six years to determine general policy, conduct elections for the elected officials of the union, review the Union's work since the last PLENIPOT and revise the Convention if it is considered necessary. It also establishes the basis for the Union's annual budgets, sets general limits on expenditures until

the next PLENIPOT and establishes a program of future conferences and meetings and sets general limits on expenditures until the next PLENIPOT.[2]

6. The ITU's 13th PLENIPOT is scheduled to be held in Nice, France, during the period 23 May 1989 through 29 June 1989. While this conference is essentially political in nature and does not deal directly with regulation of international and domestic telecommunications, its impact on the American public is nonetheless important because of the matters it does deal with and their overall effect on telecommunications.

II. NOTICE OF INQUIRY

7. On June 30, 1988, this Commission adopted a Notice of Inquiry in order to inform the general public, particularly the U.S. telecommunications community of users and companies interested in the provision of international telecommunications facilities, services and related equipment, of the upcoming PLENIPOT. [3] The *Notice* provided extensive background information on the ITU, a brief summary of substantive results from the previous PLENIPOT,[4] and a listing of the agenda for the Nice PLENIPOT as set forth in Article 6 of the ITU Convention. The *Notice* indicated that it would be impossible to list all potential issues that may arise at the Nice PLENIPOT. However, noting that the Nice PLENIPOT would have a profound impact on all ITU Member countries and their telecommunications infrastructures, the *Notice* identified several topic areas that could have a significant impact on U.S. telecommunications policy and/or on U.S. companies and individuals involved with international telecommunications: (1) Role of the ITU; (2) Election of ITU Officials; (3) Principle of Rotation; (4) ITU Headquarters Structure; (5) Future Program of Conferences and Meetings; (6) IFRB Technical Standards/Consultation with Administrations; (7) Status of Final Acts of Regional Conferences; (8) Basic Instrument of the Union; (9) Reservations; and (10) Financing Technical Cooperation and Assistance.[5] The *Notice* particularly sought views with regard to these ten topic areas while generally calling for public comment on the totality of the agenda for the Nice PLENIPOT.

8. The *Notice* stated that this is basically an information providing and gathering proceeding, as opposed to a preparatory effort for a specific technical conference, and that the comments provided in response would assist the Commission in its preparations for the PLENIPOT and would be of value to the intragovernmental preparatory process involving the primary interested agencies (the Commission, the Department of State, and the National Telecommunications and Information Administration). Finally, the *Notice* indicated our intention that the information developed within this proceeding would be made available to the preparatory process of the U.S. ITU PLENIPOT Delegation.

III. SUMMARY OF COMMENTS

9. We received 14 comments and 5 reply comments in response to the *Notice*.[6] The commenting parties fall broadly within the following categories: large users; broadcasting interests; satellite interests; international common carriers; and the RBOCs (Regional Bell Operating Companies). Most commenters did not address all ten potential significant issues as set forth in the *Notice*, but rather limited their comments to selected areas. Some commenters raised issues or made suggestions on matters not specifically listed in the *Notice*.[7]

10. *Role of the ITU:* Most commenting parties support continuation of the existing ITU telecommunications role within the UN family of agencies of harmonizing international telecommunications between and among nations. AT&T, BellSouth, CBS, CITICORP/EDS, COMSAT, Codding, IBM, MCII, NYNEX and PAS all emphasize the critical international role of the ITU in the telecommunications standards setting process and assert that the ITU should maintain its concern with technical and operational matters rather than becoming involved with political and policy matters extraneous to improving international interconnectivity and interoperability. BellSouth, CBS, CITICORP/EDS, COMSAT and IBM specifically take the position that the ITU should work cooperatively with other international and regional standards setting bodies to avoid duplication and overlap, while Codding emphasizes the need for a single agency (ITU) that can take into consideration all of the needs of all participants in international standards making in light of the proliferation of other standards organizations. Regarding the "Study Question" approach of developing standards in the ITU, the majority of those commenting on this (AT&T, CBS, CITICORP/EDS, COMSAT and MCII) support retention of this method, while IBM maintains that it is not the method which matters, but that full participation will enhance the goal of developing mature and fully-considered recommendations within realistic time frames. Finally, Codding suggests the possibility of reducing the four-year plenary cycle of the CCIs in order to speed up the process of producing recommendations.

11. *Election of ITU officials:* Seven commenters addressed the issue of election of Directors of the CCIs. While Codding asserted that it was a mistake to have moved such elections from the Plenary Assemblies of the CCIs to the PLENIPOT, he cautioned that attempts to rectify this at Nice may unnecessarily alienate the developing countries who had pushed for such elections by the PLENIPOT in Nairobi. The other six commenters (AT&T, BellSouth, CBS, COMSAT, NAB and NYNEX) supported the election of the Directors of the CCIs by their respective Plenary Assemblies, where judgment of technical qualifications and competence is much more likely, as opposed to the PLENIPOT, which is a more politicized forum. With regard to the IFRB, AT&T, BellSouth and Codding agreed that increasing the number of elected officials would not be in the interest of the U.S. Comsat felt that increase in the number of IFRB members should be explored only if the U.S. were assured of a seat on the Board; otherwise, the IFRB should not be increased in numbers.

12. *Principle of Rotation:* Of the seven commenters (BellSouth, CBS, COMSAT, IBM, MCII, NAB and NYNEX) who addressed the issue of whether the principle of rotation should be applied to the elected officials of the ITU and to membership on the Administrative Council, there was unanimous opposition to its application. Several of these commenters indicated that such a situation would diminish demonstrated commitment, financial support and technical contributions to the ITU by the larger industrialized Member countries and could sacrifice consistent, expert and efficient leadership in the ITU. In general, these commenters agreed that criteria for candidates to elected posts in the ITU and for membership

on the Administrative Council should be based upon competence, relevant experience and demonstrated support - not on rotation. Without detailed elaboration, one commenter (COMSAT) indicated that if the principle of rotation were to be adopted, it should be limited to only a portion of positions in question, reserving some positions for more permanence.

13. *ITU Headquarters Structure:* Ten commenting parties (AT&T, BellSouth, CBS, CITICORP/EDS, COMSAT, Codding, IBM, MCII, NAB, and NYNEX) addressed this topic with the consensus view that the ITU federal structure should not be changed, since it generally reflected a balance of interests within the ITU and among its Member countries. Although supporting the adequacy of the basic structure, CBS indicated that a better balance would ensue if more budgetary discretion were allowed the CCIs and the IFRB while maintaining an appropriate and clearly defined level of overall supervision by the Secretary-General and the Coordinating Committee. Likewise, COMSAT suggested that more restraints could be placed on the Secretary-General, but that the basic structure should remain as is. Those commenting were unanimous in their view that combining the CCITT and the CCIR would not be in the interests of the United States and pointed toward the differences between the two: subject matters covered; operating and meeting procedures; type of expertise needed for participation; etc. While some commenters suggested that some economies may result from consolidating to some extent the secretariats of the CCIs (AT&T, Codding, COMSAT, MCII, NYNEX), others were firm in suggesting that no efficiencies or economies would result from administrative consolidation (BellSouth, CBS, IBM, NAB, CITICORP/EDS).

14. *Future Program of Conferences and Meetings:* Those commenting in this area were of the general view that no conference or meeting should be held unless there was a demonstrated need for it. Otherwise, the comments were directed generally to specific areas of interest:

a) ARINC asserted that Resolution COM4/14 of the 87 Mobile WARC, calling for a conference before 1992, should not be interpreted to mean that even more AMSS(R) spectrum should be reallocated to LMSS and that the U.S. should not advocate or support any proposals for a mobile conference in the 1989-1995 timeframe that would further reduce AMSS(R) allocations.

b) AMSC supported scheduling a Mobile WARC as soon as practicable and not later than 1992, asserting that the 87 Mobile WARC moved in the direction of allocation of L-band for generic MSS and that the world telecommunications community desires a more definitive position regarding generic MSS.

c) AAR recommended that the U.S. oppose the scheduling of a general allocation conference in the 1989-1995 time frame so as to maintain some stability in spectrum allocations. Noting that the last general allocation conference was held in 1979 and is only now well into being implemented, AAR cautions against even a "limited" allocation conference due to the possibility of a "domino effect" occasioned by limited allocations requiring the accommodation of a displaced service elsewhere in the spectrum. In the view of AAR, any allocation conference (limited or general) should be deferred until after 1995.

d) BellSouth asserted that it is premature to convene a general allocation conference, but recommends a mobile allocation conference in the 1992-1995 time frame due to the results of the 83 and 87 Mobile WARCs and rapid technological development in both terrestrial and space mobile communications. BellSouth also calls for a special WARC to improve the confusing regulatory provisions and procedures concerning the bringing into use of frequency assignments for both terrestrial and space stations.

e) CBS believed that major conferences should only be held when a genuine need arises and no more than once per year. CBS does not advocate or oppose any particular conference, but does say that it has a special interest in accommodation of new technologies like High Definition Television (HDTV).

f) COMSAT opposed a general WARC in the 1989-1995 timeframe, citing risks outweighing potential benefits and the substantial costs involved with such a conference. COMSAT suggested the possibility of a pre-1995 Space WARC, depending on the 1988 ORB-2 conference results and their implementation, but contended that any such conference should be clearly limited.

g) Codding did not address any particular conference, but offered suggestions on ways of reducing the time and expenses involved in radio conferences. He opined that the CCIR could handle the responsibility of updating all the routine Radio Regulations, similar to the way the Telegraph and Telephone Regulations were handled, as well as allowing other international specialized agencies to assume responsibility for revisions to Part B of the Radio Regulations; ICAO could handle the Aeronautical Mobile Service and IMO could handle the Maritime Mobile Service and the Maritime-Mobile Satellite Service.

h) IBM stated that, considering the expense involved, conferences should not be scheduled on the basis of when the last one was held, but should be based upon a clearly identified and established need to address some clear and compelling problem. Otherwise, conferences " . . . simply should not be held."

i) NAB supported a selective conference schedule that minimizes costs to both the ITU and its Member countries. NAB states that there is no demonstrated need for a conference to deal with Satellite Sound Broadcasting and that any consideration of such a conference should be the lowest ITU priority for a future conference. Citing existing bilateral agreements with Canada and Mexico as being effective, NAB opposed Region 2 conferences for coordination of FM and TV broadcasting. With regard to FM broadcasting and aeronautical compatibility, NAB believed that this matter warrants further development prior to consideration by any separate aeronautical conference and states that it is definitively premature to establish a specific U.S.

position on the compatibility question. Likewise, NAB asserted that it is premature to schedule a conference for realignment of existing broadcast allocations or new allocations to accommodate new technologies such as high definition television (HDTV). NAB suggested that a general allocation conference in the post-1995 time period may allow time for the maturation of the spectrum requirements issues associated with advanced television (ATV).

j) NSP opposed limiting any Mobile WARC in the 1989-1995 time frame to only allocation issues in the 1-3 GHz range. NSP urged that the next Mobile WARC should be fully capable of addressing coordination of transnational paging. Thus, NSP advocated that the U.S. affirmatively seek the placement of international paging issues within the competence of the next Mobile WARC and that such a conference not be limited to 1-3 GHz so that paging below 960 MHz may be considered.

k) PAS shared concerns about the proliferation of ITU conferences and states that the U.S. approach to such conferences should be to promote competition. PAS suggested that orbital and spectrum allocation decisions should allow for a multiplicity of U.S. carries and facilities providers to participate in domestic and international communications.

15. *IFRB Technical Standards; Consultation with Administrations:* Only four commenting parties addressed this topic (CBS, COMSAT, Codding and NAB) and they were unanimous in their support for a requirement that the IFRB consult with administrations when the IFRB is developing technical standards. COMSAT asserted strong opposition to allowing the IFRB to set permanent standards and suggests that a Technical Standard established by the IFRB be considered provisional unless it is set forth as a CCIR Recommendation or adopted as part of the Radio Regulations. COMSAT further suggested that concurrence of directly affected administrations be sought and that all administrations be notified of the proposal. CBS saw this consultation procedure as an important improvement in the management of ITU activities and suggests that the Coordinating Committee act as liaison between the CCIs and the IFRB on such matters. Codding saw no serious problem with implementing such a consultation requirement.

16. *Status of Final Acts of Regional Conferences:* Only three commenting parties addressed this topic (CBS, COMSAT and Codding). CBS believed that any proposal to have non-signatories bound by the Final Acts of Regional Conferences as a means to foster greater participation in developing effective regional agreements requires further study. COMSAT suggested that actions of Regional Conferences be treated as ratified until taken up at the next World Conference competent to address the issues involved. During any interim period, COMSAT suggested that conflicts between existing and new provisions would generally be resolved in favor of the more restrictive provision. Codding suggested investigating the possibility of creating regional radio regulations, but cautioned against proliferation of conferences.

17. *Basic Instrument of the Union:* Six of the eight commenters on this subject (AT&T, CITICORP/EDS, COMSAT, IBM, MCII and NYNEX) supported the objectives of Resolution 62 from the Nairobi PLENIPOT which would bifurcate the existing ITU Convention into a "permanent" Constitution and a "less permanent" Convention. Most commenters cited stability for the ITU and its Members, minimizing politicization of ITU work, and increased efficiency at PLENIPOTs as reasons for their support, while cautioning that such support assumed that there would be no substantive changes in the existing Convention. ARINC pointed out that the Nice PLENIPOT would be the last opportunity to alter provisions that may be placed in a new Constitution by a simple majority vote and urged that U.S. interests be protected from being "locked out" by the incorporation of provisions in a new Constitution that would discriminate against developed nations. Codding did not see this issue as important, since most time at recent PLENIPOTs has been spent on elections and political matters that have nothing to do with fundamental provisions in the existing Convention and in his opinion most fundamental changes desired by developing countries have already been made.

18. *Reservations:* Generally, those commenters addressing this topic (ARINC, AMSC, CITICORP/EDS, CBS, and COMSAT) were of the opinion that the issue of the status of reservations (final or provisional) should be clarified at the Nice PLENIPOT. ARINC, AMSC and CITICORP/EDS agreed that reiteration of previously expressed reservations at the time of ratification of a new Constitution and Convention should not be necessary, but that, out of an abundance of caution, the U.S. nevertheless should reiterate its reservations to final acts and regulations of prior conferences which the U.S. wishes to preserve, until such time as this matter is definitively settled. ARINC pointed out that while the U.S. has not formally ratified the Vienna Convention on the Law of treaties, it is universally recognized as the codification of existing international law and forms the basis for judging the procedural and substantive validity of reservations taken to the ITU Convention, Regulations and Final Acts of conferences. ARINC further noted that while Articles 42 and 43 of the ITU Convention do not explicitly spell out the need to reiterate previous reservations, it was concerned that other countries might assert that such a requirement is not an unreasonable interpretation. Both ARINC and CITICORP/EDS expressed the concern that unless a specific reservation is taken with regard to the Final Acts and/or Regulations of the 1988 WATTC, signing or ratification of the Nice PLENIPOT results could inadvertantly constitute acceptance of the 1988 WATTC results.

19. *Financing Technical Cooperation and Assistance:* Commenters addressing this topic (AT&T, CITICORP/EDS, COMSAT, Codding, MCII and NYNEX) generally favor continued support of ITU technical assistance activities as well as funding for such activities from traditional sources - government support and voluntary contributions. Codding asserted that there likely will be continued pressure from developing countries to create a special ITU technical assistance fund which would be funded from the ITU regular budget as well as proposals to switch to the "UN System"[8] of financing so as to place a greater burden on the most developed countries (including the U.S.). He stated that a possible proposal to fund such assistance through a portion of international telecommunications accounts settlements should be explored further, but suggested that the U.S. accept creation of a regular budget technical assistance fund to be used only

in emergencies, as determined by the ITU Administrative Council, so as to blunt pressure from developing countries at a modest additional cost. On the other hand, COMSAT strongly opposed the trend toward diversion of ITU funds to "special activities", since such diversion weakens the ITU in its areas of greatest competence (dealing with standards and technical matters) and diminishes overall ITU effectiveness. CITICORP/EDS, MCII and NYNEX explicitly opposed any possible proposals to fund technical assistance activities out of portions of international telecommunications accounts settlements. Creation of such a mechanism would result in a costly, administratively burdensome process that raises many substantive and implementation issues. Additionally, CITICORP/EDS opposed any type of international "access charge" for funding technical assistance activities, asserting that would create major obstacles to development of intra-corporate networks or new value added services.

20. *Additional Matters:* Several commenting parties raised additional issues which will be briefly addressed here:

a) ARINC asserted that the ITU Convention is structured on the underlying principle that telecommunications are provided by government-controlled monopolies and that its experience has been that both PTT Administrations and commercial common carriers are unable or reluctant to provide sophisticated and reliable communications which are vital to safe, expeditious and economic operation of the world's air transportation. ARINC urged the U.S. Delegation to seek changes to ITU basic documents so as to recognize the increasingly important role played by private entities in the provision of international telecommunications. ARINC asserted that unless the ITU modifies restrictive treatment of transnational transmission links, liberalization trends in telecommunications regulation, benefits of competition and free flow of information among nations will be jeopardized.

b) Codding made three suggestions: (1) since the ITU Administrative Council is having increasing difficulty in adequately treating all the subjects coming before it, it is time to consider some past proposals to have additional working groups handle matters between annual Council meetings or to establish an executive committee to make certain decisions between Council meetings (but not to increase the size of the Council); (2) since the ITU is one of only two UN Specialized Agencies that excludes the press and the public from its meetings, the U.S. should further the concept of freedom of information and make a proposal at the Nice PLENIPOT to open ITU conferences and meetings to the press and the public; and (3) there is a need to revise the definition of "administrations" contained in the ITU Convention so as to account for the changes in many countries concerning responsibility for provision of telecommunication services.

c) IBM proposed allowing Scientific and Industrial Organizations (SIOs) to participate fully in the work of the CCIs on a par with RPOAs, thus providing a broader base for input and private sector participation in the CCIs as well as providing SIOs a much-needed voice in Plenary Assemblies and other activities that affect them.

IV. DISCUSSION

21. This Commission fully supports U.S. participation in the International Telecommunications Union and its purposes of maintaining and extending international cooperation between all Members of the Union for the improvement and rational use of telecommunications, of promoting the development of technical facilities and their most efficient operation with a view to improving the efficiency of telecommunications services, increasing their usefulness and making them generally available to the public and of harmonizing the actions of nations relating to international telecommunications. As indicated in the *Notice*, this proceeding was instituted to provide information concerning the ITU and the Nice PLENIPOT to the American public and to gather information on potential issues from the public for use within the preparatory process of the U.S. ITU PLENIPOT Delegation. Noting that the ITU PLENIPOT is a government-to-government process, that it is not a technical conference and that this proceeding is collecting public information for use by the U.S. Delegation preparatory process in developing U.S. proposals and positions, we do not here draw any specific conclusions from the comments received.

22. Consequently, in order to provide this public input to the U.S. Delegation preparatory process as rapidly as possible and to preserve the full range of options in developing the U.S. positions for this important conference, we are providing the summary of comments in this Report and Order and intend to expeditiously provide it, along with complete copies of all comments in this proceeding, to the designated leadership of the U.S. Delegation to the 1989 Nice Plenipotentiary Conference.[9]

V. PAPERWORK REDUCTION ANALYSIS

23. We have analyzed this *Report and Order* with respect to the Paperwork Reduction Act of 1980, 44 U.S.C. Sections 3501-3502, and have found that it imposes no new or modified information collection requirements on the public.

VI. REGULATORY FLEXIBILITY ANALYSIS

24. We have determined that the provisions of the Regulatory Flexibility Act of 1980, 5 U.S.C. Sections 601-612, do not apply to this proceeding. Pursuant to Section 605(b) of the Act, Sections 603 and 604 do not apply because this is not a Rule Making proceeding and does not involve any rule which, if promulgated, would have a significant economic impact on a substantial number of small entities.

VII. ORDERING CLAUSES

25. Pursuant to Sections 4(i) and 303 of the Communications Act of 1934, as amended, this Report and Order IS ADOPTED. IT IS ORDERED That this Report and Order be transmitted, along with complete copies of all the comments filed in this proceeding, to the Executive Director, United States Delegation to the ITU Plenipotentiary Conference, Department of State, for consideration

by the preparatory process of the U.S. Delegation. IT IS FURTHER ORDERED, That a copy of this Report and Order, along with complete copies of all the comments filed in this proceeding, be transmitted to the Head of the United States Delegation to the ITU Plenipotentiary Conference.

26. IT IS FURTHER ORDERED, That the request to accept the late-filed reply comments, filed in this proceeding by BellSouth IS GRANTED.

27. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Comments Received

1. Aeronautical Radio, Inc. (ARINC)
2. American Mobile Satellite Consortium, Inc. (AMSC)
3. American Telephone and Telegraph Company (AT&T)
4. Association of American Railroads (AAR)
5. BellSouth Corporation (BellSouth)
6. CBS Inc. (CBS)
7. Communications Satellite Corporation (COMSAT)
8. George A. Codding, Jr. (Codding)
9. GTE Spacenet Corporation (GTE Spacenet)
10. International Business Machines Corporation (IBM)
11. MCI International, Inc. (MCII)
12. National Association of Broadcasters (NAB)
13. National Satellite Paging (NSP)
14. Pan American Satellite (PAS)

Reply Comments Received

1. Aeronautical Radio, Inc. (ARINC)
2. CITICORP and Electronic Data Systems Corporation (CITICORP/EDS)
3. BellSouth Corporation (BellSouth)
4. NYNEX Corporation (NYNEX)
5. Pan American Satellite (PAS)

APPENDIX B

Commenters/Issues Cross-Reference Chart

FOOTNOTES

[1] International Telecommunication Convention (Nairobi, 1982) (hereinafter referred to as the ITU Convention). The ITU Convention is the treaty document that controls all ITU activities and sets the general principles applied in establishing international rules for the provision of telecommunications, the use of the electromagnetic spectrum and the use of the Geostationary-Satellite Orbit (GSO).

[2] *Id.*, Articles 6 and 53. The PLENIPOT is a meeting of ITU Member governments and is essentially political in nature.

[3] *See*, In the Matter of The Plenipotentiary Conference of the International Telecommunication Union, Nice, France (1989), Notice of Inquiry, General Docket No. 88-351, (released July 8, 1988), 3 FCC Rcd 4478 (1988) (hereinafter *Notice)*.

[4] The previous ITU Plenipotentiary Conference was held in Nairobi, Kenya, for six weeks commencing on September 27, 1982.

[5] Detailed discussion of these subject areas is contained in paragraphs 19-42 of the *Notice*.

[6] *See*, Appendix A for a list of parties filing Comments and Reply Comments. BellSouth filed its Reply Comments on August 25, 1988, one day after the closing date for replies specified in the *Notice*. Considering that the BellSouth Reply Comments were only one day late, that copies were served on all parties filing comments in this proceeding, that inclusion would serve the public interest by developing a fuller informative record, and that no interested party would be prejudiced by acceptance of the BellSouth Reply Comments, we grant the BellSouth request to accept their late-filed Reply.

[7] *See*, Appendix B for a cross-reference chart of the commenters in this proceeding and the listed issues in the Notice.

[8] The ITU financing system utilizes voluntary subscriptions by Member countries of contributory units. The larger industrialized countries (including the United States) subscribe to 30 units while the smaller countries subscribe to amounts as low as 1/8 unit. Under this system, the United States provides approximately 7-8% of the ITU budget. Under the "UN System," non-voluntary assessments are made based upon the relative wealth of the countries. The United States provides approximately 25% of the UN budget under that system and would pay approximately 25% of the ITU budget under the UN system.

[9] While Commission representatives continue to participate in the preparatory process of the U.S. Delegation, along with representatives of the Department of State, NTIA, DOD, USTR and other interested agencies, the designated leadership of the U.S. Delegation consists of: (1) the Head of the U.S. Delegation, Mr. C. Travis Marshall, Senior Vice President and Director of Government Relations for Motorola, Inc.; and (2) the Executive Director of the U.S. Delegation, Mr. Daniel Clare, U.S. State Department.

Before the
Federal Communications Commission
Washington, D.C. 20554

Mr. Harry R. Shriver
The Baltimore Radio Show, Inc.
13 East 20th Street
Baltimore, Maryland 21218

ERRATUM

Released: December 16, 1988

The By Direction Letter (FCC 88-300), which appears at 3 FCC Rcd 5913, reflects a release date of September 28, 1988. The actual release date was November 17, 1988.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ORIONNET, INC. File No. CSG-88-083-P/L

Application for authority to construct and operate an international multipurpose earth station facility at Shenandoah Court, Virginia.

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: December 8, 1988; Released: December 16, 1988

By the Chief, International Facilities Division:

1. On August 4, 1988, OrionNet, Inc. (ONI) filed an application requesting authority under Title III of the Communications Act of 1934, as amended, and Sections 201(c)(4), 201(c)(6), 201(c)(7), 201(c)(9) and 210(c)(7) of the Communications Satellite Act of 1962, as amended, to construct and operate an international multipurpose INTELSAT Revised Standard A earth station facility at Shenandoah Court, Virginia, to communicate with INTELSAT Atlantic Ocean Region (AOR) satellites for the provision of international telecommunications services. The application was placed on public notice August 10, 1988.[1]

2. ONI is a non-dominant common carrier authorized by the Commission to operate as an international carrier in May, 1988.[2] The proposed multipurpose earth station at Shenandoah Court, Virginia, will consist of an 18.3 meter antenna meeting INTELSAT Revised Standard A technical parameters. The earth station will operate with an INTELSAT AOR satellite in the 5925 - 6425 MHz transmitting frequency band and the 3700 - 4200 MHz receiving frequency band and will possess Intermediate Data Rate capabilities. ONI states that the station design will permit operation with any existing or planned INTELSAT satellite serving the AOR. Initially, it intends to utilize the facility primarily for the provision of switched voice services. It plans to offer additional telecommunications services over the multipurpose station in the future. ONI estimates the multipurpose earth station will require a capital expenditure of approximately1,528,000.

3. In its Report and Order in the *Earth Station Ownership Proceeding*, CC Docket No. 82-540, the Commission established a more open and flexible earth station policy which allowed entities other than the Earth Station Ownership Committee (ESOC) to own and operate international earth stations that access the INTELSAT system. The Order permitted the joint carrier owners of ESOC earth stations to decide among themselves the future of ESOC. [3] The Commission also concluded that when reviewing applications for these international earth stations, it would distinguish between earth stations dedicated to providing IBS and/or television services and multipurpose stations. IBS and/or television earth stations, the Commission found, do not have the same potential for revenue diversion and significant impact on system efficiency as multipurpose earth stations. Consequently, the Commission concluded that it would consider only the minimal legal, financial and technical qualifications of the applicant as required by Sections 308 and 319 of the Communications Act of 1934, as amended, when reviewing applications for IBS and/or television earth stations Absent special problems, the Commission stated that it would treat these applications as routine and process them expeditiously.

4. With respect to multipurpose stations, the Commission stated that it would continue close scrutiny of applications for construction and operation of these facilities since they tend to raise more complex economic, technical and operational issues that may affect the variety, quality and price of service offered to users. In determining whether the grant of an application for a multipurpose earth station will serve the public interest, the Commission indicated it would conduct an analysis by balancing the possible benefits (*e.g.*, shorter terrestrial hauls, increased user options, lower charges to users, and increased customer base for INTELSAT services) against the possible detriments (*e.g.*, reduced technical efficiency, harmful revenue diversion, service deterioration and higher charges to users) which a particular application may present.[4] However, with the dissolution of ESOC earth station ownership arrangements and the transition to a competitive environment, the issue of harmful revenue diversion from existing ESOC earth stations is no longer a concern. More recently, the Commission has begun to focus on the quality and continuity of service to users and the availability of access to authorized carriers.[5]

5. We find that ONI has the necessary legal, technical and financial qualifications to construct the proposed multipurpose earth station. ONI is a common carrier pursuant to Section 214 of the Communications Act of 1934, as amended. The proposed earth station conforms with INTELSAT performance criteria for Revised Standard A earth stations. ONI has completed the necessary frequency coordination.

6. We believe the public interest will be served by the construction and operation of the proposed INTELSAT Revised Standard A multipurpose earth station at Shenandoah Court, Virginia. ONI is confident that the services provided through the multipurpose station will be technically efficient and of high quality. In addition, the proposed facility will help increase international service options available to users, contribute to the development of effective international competition and will assist in expanding the customer base for INTELSAT services. Furthermore, ONI, as a non-dominant carrier subject to competitive forces, does not have the market power to have a significant negative impact on any carrier's ability to provide service to the public. Therefore, we conclude that grant of the instant application will serve the public interest.

7. Accordingly, IT IS ORDERED, pursuant to Sections 304, 309 and 319 of the Communications Act of 1934, as amended, and Section 201(c) of the Communications Satellite Act of 1962, as amended, that application File No. CSG-88-083-P/L IS GRANTED; and ONI is authorized to construct and operate the proposed INTELSAT Revised

Standard A multipurpose earth station with one 18.3 meter antenna at Shenandoah Court, Virginia, for the provision of international telecommunications services.[6]

8. IT IS FURTHER ORDERED that before completion of equipment installation and facility activation, the applicant shall provide the Commission with a summary of equipment which was actually installed.

9. IT IS FURTHER ORDERED that Special Temporary Authority (CSG-88-083-P/L-T-1) granted to ONI on August 18, 1988, is HEREBY TERMINATED.

10. The Commission retains jurisdiction over this matter to ensure that all present and future authorized carriers have nondiscriminatory use of, and equitable access to, the communications satellite system and earth stations.

11. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order. (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] The Commission received a letter dated September 7, 1988, from Bell Atlantic requesting that we hold ONI's application because it was not filed in accordance with Section 25.203 (c) of the Commission's Rules. By letter dated November 2, 1988, Bell Atlantic withdrew its request.

[2] *See* OrionNet, Inc., 3 FCC Rcd 2730 (1988). ONI was granted authority to lease from Comsat and operate 24 voice-grade satellite circuits between an earth station on the east coast of North America and an appropriate satellite over the Atlantic Ocean connecting with similar circuits between the satellite and earth stations in Ireland (21 circuits); the Netherlands (1 circuit); Sweden (1 circuit); and the United Kingdom (1 circuit).

[3] Earth Station Ownership, 100 FCC 2d 250 (1984).

[4] *Id.* at 284.

[5] *See* American Telephone & Telegraph Company, 2 FCC Rcd 6635 (1987).

[6] This authorization is not to be construed as permitting the provision of any service between earth stations located within in the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

PAUL AND NANCY SCHUMACHER — File No. BPH-870519IC

For a Construction Permit to Modify
the Facilities of Station WSJL(FM),
Cape May, New Jersey

MEMORANDUM OPINION AND ORDER

Adopted: December 8, 1988; Released: December 16, 1988

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief, Mass Media Bureau acting pursuant to authority delegated under 47 C.F.R. § 0.61 and 0.283, has before it the *Order to Show Cause* in this proceeding, DA 88-1650, released October 18, 1988, directed to Paul and Nancy Schumacher (The Schumachers), holders of a construction permit to modify the facilities of station WSJL(FM), Cape May, New Jersey. The Schumachers were directed to show cause why the WSJL(FM) permit should not be modified to specify operation with a maximum tower height of 244 feet above ground level (AGL) and 254 feet above mean sea level (AMSL) rather than its currently authorized 300 feet AGL and 310 feet AMSL. On November 2, 1988, the Schumachers filed a response to the *Order to Show Cause*.

2. *Background*. On June 2, 1985, the Schumachers notified the FAA of a proposed alteration in the technical facilities of WSJL(FM). The FAA's aeronautical study no. 85-AEA-0675-OE indicated that the proposed tower would not be a hazard to air navigation if it were reduced to a height of 244 feet above ground level (AGL), 254 feet above mean sea level (AMSL); the determination was issued on May 2, 1986 and was valid for six months. On April 22, 1987, the FAA granted a six-month extension of time for the May 2 grant. However, the extension erroneously specified the originally proposed height of 310 feet AMSL rather than the negotiated height of 254 feet AMSL. On May 19, 1987, the Schumachers filed the instant modification, requesting *inter alia*, an increase in tower height to 310 feet AMSL. The application was granted on January 27, 1988, and the proposed antenna tower has since been erected. However, on June 2, 1988, the FAA issued a "Determination of Hazard to Air Navigation," indicating that the error in the extension did not change the conditions of the original determination.

3. In response to legislation revising Section 316 of the Communications Act, the Commission revised Section 1.87 of our Rules, the section which implements Section 316 of the Act.[1] *See Modification of FM and Television Licenses Pursuant to Section 316 of the Communications Act*, 2 FCC Rcd 3327 (1987). Under the revised rules, there is no longer an automatic right to a hearing upon request. Instead, the revised Section 1.87 of the Rules sets forth a notification requirement for the benefit of the affected licensee/permittee. The affected party must be notified of the proposed action and the resulting public interest benefits. In order to obtain a hearing, the licensee/permittee must now establish a substantial and material question of fact as to whether the proposed modification serves the public interest.

4. In response to the *Order to Show Cause*, the Schumachers stated that: (i) after five years of attempting to find a way to erect a 3[illegible]2-foot tower in the service area, and several FAA disapprovals, WSJL(FM) was cleared by the FAA for a 300 foot tower at the station's present location; (ii) the Schumachers "double checked" with David Fosdick, "Eastern Manager of the FAA," and were assured that the tower was cleared; (iii) the old tower was dismantled and the new tower built before the FAA issued its determination that the 300-foot tower was in fact an air hazard; (iv) "[b]ecause Cape May is a densely populated area, *no* aircraft should ever be anywhere near 300 feet AGL when approaching or departing the airport in question"; (v) the WSJL tower is "nowhere near" the airport's instrument approach flight path, and thus should not at all necessitate an increase in the instrument approach minima (or "Minimum Descent Altitude" in the FAA's determination) of the Cape May airport; (vi) there are virtually no alternate tower sites in the Cape May area upon which to build a tower of the height desired here;[2] and (vii) to order the lowering of the WSJL(FM) tower at this point would be "grossly unfair" since the tower was lawfully built and over30,000 was spent in erecting it, leaving the Schumachers with little or no reserve capital to spend in lowering the tower.

5. *Discussion*. We do not believe that the Schumachers have raised a substantial and material question of fact regarding whether or not the 300-foot WSJL(FM) tower constitutes an air hazard. The standard which the Schumachers must attain is, on the basis of the entire record before us, "whether the totality of the evidence raises a sufficient doubt on the point that further inquiry is called for." *Gencom, Inc. v. FCC*, 832 F.2d 171 (D.C. Cir. 1987), *citing Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392, 397 (D.C. Cir. 1985). The Schumachers' arguments regarding the disadvantages and inconvenience of lowering the WSJL(FM) tower do not go to the central issue presented here, *viz.*, whether or not the 300-foot tower constitutes an air hazard. Similarly, the FAA's prior erroneous approval of the 300-foot tower in the April 22 extension does not negate the fact that the Agency now maintains, as it originally maintained, that a tower of that height endangers air traffic to and from the Cape May airport. Furthermore, as stated in the June 2 determination of hazard, the mere extension of an FAA approval cannot change the other conditions of a determination.

6. The Schumachers' other arguments directly address the issue in question. However, we do not believe that these arguments contradict the FAA's June 2 finding in such a manner that an evidentiary hearing is called for. Specifically, the Schumachers allege that no aircraft should approach the densely populated Cape May area at 300 feet AGL and that the WSJL(FM) tower is so far from the airport's instrument approach flight paths that the tower should have no effect or the airport's Minimum Descent Altitudes.[3] Mr. Schumacher indicates that he is a pilot who has flown in and out of the Cape May airport many times and has never found the WSJL(FM) tower to be an air safety factor. However, the general assertion that no airplane should approach the airport at 300 feet and

that the tower is "nowhere near" the airport flight path do not cast sufficient doubt on the propriety of the June 2 determination to warrant further inquiry in this regard. Furthermore, we do not believe that Mr. Schumacher's personal experiences in flying from the Cape May airport carry significant weight here, if for no other reason then because, as an owner and operator of WSJL(FM), he would of course know the whereabouts of the tower, thus minimizing any potential air hazard to him on such private flights. The same knowledge cannot be imputed to other pilots using the Cape May Airport. While we are sympathetic to the Schumachers' plight, the record here does not contain sufficient contrary evidence to question further the FAA's air hazard determination with respect to WSJL(FM)'s tower.

7. Accordingly, pursuant to authority contained in Sections 4(i), 5(c)(1), 303(r), and 316(a) of the Communication Act of 1934, as amended, and Section 0.61, 0.204, 0.283, and 1.87 of the Commission's Rules, IT IS ORDERED, That effective January 5, 1989, the construction permit (BPH-870519IC) of Station WSJL(FM), Cape May, New Jersey, IS MODIFIED to specify operation with an overall tower height of 244 feet above ground level (254 feet above mean sea level) from its present location, subject to the following condition:

(a) Within 30 days of the release of this Order, the permittee shall submit an application for construction permit (FCC Form 301) to obtain authorization for any concommittant engineering changes necessitated by the reduction in height of the WSJL(FM) tower.

8. IT IS FURTHER ORDERED, That a copy of this document shall be mailed to each party to this proceeding.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Alex D. Felker, Chief
Mass Media Bureau

FOOTNOTES

[1] By Public Law 98-214, enacted December 8 1983, 97 Stat. 1467, the phrase "show cause by public hearing, if requested, why such order of modification should not issue" was deleted from Section 316 of the Act. Public Law 98-214 also imposed upon protesting parties requesting a hearing a requirement identical to that of Section 309 of the Act. Specifically, a protesting party must establish the existence of a substantial and material question of fact in order to obtain a hearing under Section 316 of the Act.

[2] The Schumachers anticipate that lowering the tower height as requested by the FAA will reduce WSJL(FM's) coverage of the Cape May area by as much as 40%.

[3] The Minimum Descent Altitudes should be raised, the Schumachers note, "because of the danger to the Cape May area population from low flying aircraft in hazardous weather."

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

MEMORIAL HOSPITAL
Albany, New York — File No. MW-2646

LEONARD HOSPITAL
Troy, New York — File No. MW-2647

ST. MARY'S HOSPITAL OF TROY
Troy, New York — File No. MW-2647-A

For a Waiver of Rule Section 94.75(b)
to Allow Use in a Frequency Congested
Area of an Antenna Not Meeting
Category A Performance Standards.

ORDER

Issued: December 5, 1988; Released: December 16, 1988

By the Chief, Land Mobile and Microwave Division:

I. INTRODUCTION

1. The above captioned applicants have each filed applications to construct and operate a 960 MHz Private Operational Fixed Microwave Service (OFS) link between their hospitals and the central hub station of a regional emergency medical communications network. The applicants wish to use a non-conforming antenna at their hub site. Pursuant to Section 94.75(b) of the Commission's Rules, 47 C.F.R. § 94.75(b), where OFS stations such as those requested here are located in frequency congested areas, applicants are required to use an antenna meeting the beamwidth and sidelobe suppression standards of Category A, rather than Category B, antenna standards. The applicants have, consequently, requested waivers of this rule.

II. BASIS FOR WAIVER

2. The applicants state that they wish to join their emergency room facilities into an Emergency Medical Organization Communications Network. The applicants plead that severe space limitations exist at the hub station of the network, the Empire State Plaza Tower Office Building. No rooftop space is available, and the only indoor area is limited in height to ten feet and width to five feet. In order for all three hospitals to work within these limitations, each applicant intends to employ a Decibel Products cylindrical parabolic antenna with a beamwidth of 19 degrees and height/length dimensions of 24 by 46 inches.[1] The applicants state that alternate site locations other than the Empire State Plaza Building were considered, but were unacceptable due to severe economic burdens associated with wireline leasing. The use of higher frequency bands, which inherently allow for smaller diameter antennas, could not provide the necessary reliability because of the path length involved *(i.e.,* 10.93 miles). Furthermore, the bandwidths normally available at these higher bands are inconsistent with the hospitals' communications capacity and would, therefore, be spectrally inefficient. Last, the applicants plead that they are reducing their effective radiated power to 38.5 dbm (approximately 7 watts) to minimize the possibility of harmful interference to other systems.[2]

III. DISCUSSION

3. The intent of Section 94.75(b) of the Rules is to provide for maximum spectrum utilization by requiring the suppression of unwanted sidelobe radiations. In this case, the hospitals propose to locate their antennas in a restricted indoor location. Thus, artificial off-axis attenuation will be provided by the building structure. Under Section 94.75(b) of the Rules, the difference in sidelobe suppression between a Category A and Category B antenna for any angle off the main beam is no greater than 6 db. The amount of signal attenuation by the building would be significantly greater than this figure. Accordingly, it would not appear to be necessary, with respect to off-axis attenuation, to require the applicants to employ Category A antennas. The applicants' reduction in effective radiated power will also enhance the possibility for frequency reuse.

4. Based on the above, we approve for an indefinite term the requests for waiver of Sections 94.75(b) of the Rules filed by the above-captioned applicants to permit in a frequency congested area the use of an antenna as described herein not meeting Category A performance standards. This use is subject to the requirement that no harmful interference be caused to other systems. We believe that grant of this waiver would be in the public interest because of the unique emergency health care communications that will be transmitted.

5. Accordingly, pursuant to Rule Sections 0.331 and 1.3, 47 U.S.C. §§0.331 and 1.3, the request submitted by Memorial Hospital, Leonard Hospital and St. Mary's Hospital of Troy for waiver of Rule Section 94.75(b) to permit use in a frequency congested area of an antenna as described herein not meeting Category A performance standards IS GRANTED for an indefinite term.

FEDERAL COMMUNICATIONS COMMISSION

Richard J. Shiben
Chief, Land Mobile and
Microwave Division

FOOTNOTES

[1] A minimally acceptable Category A parabolic antenna with a 3 db beamwidth of 14 degrees operating in the 960 MHz band would have to be approximately six feet in diameter.

[2] We note that this is approximately 12 db lower than the power used by typical 960 MHz point-to-point systems.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NACOGDOCHES TELECOMMUNICATIONS, INCORPORATED — File No. I-T-C-89-013

Application for authority to operate as an international resale carrier.

BRAMTEL, INCORPORATED — File No. I-T-C-89-014

Application for authority to operate as an international resale carrier.

LINTEL SYSTEMS, INCORPORATED — File No. I-T-C-89-015

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 9, 1988; Released: December 16, 1988

By the Chief, International Facilities Division:

1. The above-captioned applications, filed on October 18, 20 and 21, 1988, respectively, by Nacogdoches Telecommunications, Incorporated (NTI), BramTel, Incorporated (BramTel) and LinTel Systems, Incorporated (LinTel), request authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The applications were placed on public notice on November 2, 1988. No comments were received.

2. The applicants are already providing domestic resale services. They now propose to resell international switched voice services in competition with other common carriers already providing resale of such services. In recent authorizations of new entrants the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by NTI, BramTel and LinTel.

4. Accordingly, IT IS ORDERED that application File Nos. I-T- C-89-013, I-T-C-89-014, and I-T-C-89-015 ARE GRANTED, and a) NTI and LinTel are authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariff F.C.C. No. 1, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariff F.C.C. No. 1, between the United States and those points listed in those tariffs, and b) BramTel is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariff F.C.C. No. 1 between the U.S. and those points listed in that tariff.

5. Copies of any operating agreements entered into between the applicants and their correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61 (October 1, 1987).

8. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* the cases cited in the Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

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